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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANNE B. PARKS,

Petitioner,

v.

MICHIGAN EMPLOYMENT SECURITY COMMISSION and DETROIT PUBLIC SCHOOLS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN and APPENDIX

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122 pp

QUESTION PRESENTED

1. Can an employee who is fired for the exercise of First Amendment rights be further punished by the denial of unemployment benefits?

PARTIES TO THE PROCEEDINGS BELOW

Anne B. Parks

Michigan Employment Security Commission
Detroit Public Schools

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No. 86-_____

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OCTOBER TERM, 1986

ANNE B. PARKS,

Petitioner,

v.

MICHIGAN EMPLOYMENT SECURITY COMMISSION and DETROIT PUBLIC SCHOOLS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Petitioner Anne B. Parks prays that a writ of certiorari issue to review the judgment of the Supreme Court of Michigan in the above-entitled case.

REPORT OF THE OPINIONS BELOW

The opinion of the Supreme Court of Michigan is reproduced as Appendix (App.) A and is reported at 427 Mich. 224 (1986). The decision of the Michigan Court of Appeals is unreported and is reproduced as Appendix B.

The unpublished opinion and order of the Wayne County Circuit Court are reproduced as Appendix C. The unpublished opinion of the State of Michigan Employment Security Board of Review is reproduced as Appendix D. The unpublished Michigan Employment Security Commission findings of facts is reproduced as Appendix F.

JURISDICTION

The decision of the Michigan Supreme Court was entered on December 26, 1986. Jurisdiction to consider this petition is governed by the provisions of Rule 21.1 of the Revised Rules of this Court and 28 U.S.C. § 1257(3). This petition is filed with the Court within ninety days of December 26, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this petition include the First Amendment to the United States Constitution; and the Michigan Employment Security Act, MCLA § 421.1 *et seq.*; MSA § 17. 501 *et seq.*, the relevant sections of which provide:

> 421.2 Declaration of policy.
>
> Sec. 2. The legislature acting in the exercise of the police power of the state declares that the public policy of the state is as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing

force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life. Employers should be encouraged to provide stable employment. The systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, thus maintaining purchasing power and limiting the serious social consequences of relief assistance, is for the public good, and the general welfare of the people of this state.

* * * *

421.29 Disqualification for benefits; voluntary leaving; misconduct; failure to apply for suitable work; refusal of work; disqualification for discharge upon detention in jail or prison; disqualification for discharge resulting from unauthorized strike; assault and battery; theft; wilful destruction of property; requalifying weeks; duration and extent of disqualification; charging of benefits; suitable work; labor dispute disqualification; late notice of possible ineligibility or disqualification; receipt of unemployment benefits from another state or the United States.

Sec. 29. (1) An individual shall be disqualified for benefits in all cases in which he:

(a) Has left work voluntarily without good cause attributable to the employer or employing unit.

(b) Has been discharged for misconduct con-

nected with his work, whether or not the discharge has subsequently been reduced to a disciplinary layoff or suspension, or for intoxication while at work.

STATEMENT OF THE CASE

Factual Background

Dr. Anne B. Parks was hired by the Detroit Board of Education in 1935 to teach in the Detroit Public Schools.[1] At that time there was no requirement that Dr. Parks join or pay a service fee to any labor union.[2]

In 1969, the Detroit Board of Education and the Detroit Federation of Teachers entered into a collective bargaining agreement. That agreement contained a clause which made the payment of a service fee to the union a condition of employment.[3]

Dr. Parks objected to making any payment to a union that exceeds the costs of collective bargaining, contract administration and grievance adjustment, believing that such payments would violate her First and Fourteenth Amendment rights of free speech, association, and political autonomy. She objected to the union's using the fee for political and ideological purposes unrelated to collective bargaining[4] and challenged the fee as one of the plaintiffs in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

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[1] App., p. 85a.

[2] App., pp. 86a-87a.

[3] App., pp. 97a-99a, 85a.

[4] App., pp. 90a-92a, 78a.

Although Dr. Parks opposed paying the Detroit Federation of Teachers the money they demanded, she was willing to pay her share of the union's costs of collective bargaining, contract administration and grievance adjustment. Following this Court's decision in *Abood*, she offered to pay into escrow the entire fee demanded; but she was not willing to pay any money directly to the union until it proved her proportionate share of its costs of collective bargaining, contract administration and grievance adjustment.[5] Dr. Parks believed that paying the union more than her share violated her rights as guaranteed by the First and Fourteenth Amendments.

Neither the employer nor the union would let Dr. Parks escrow the contested fees. The union did not provide an accounting of its costs of collective bargaining, contract administration or grievance adjustment. Instead it demanded that she sign an authorization for deduction of service fees that contained the following language: "I hereby waive all right and claim for * * * monies paid in accordance with this authorization."[6] Dr. Parks' unwillingness to pay a fee she believed was constitutionally improper resulted in her being fired by the Detroit Board of Education.[7] Forty-three years of service to the Detroit public school system came to an end on March 10, 1978.[8] When she offered to continue to teach without pay, her offer was rejected.[9]

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[5] App., pp. 93a, 80a.

[6] App., p. 80a

[7] App., pp. 96a, 83a, 92a-93a.

[8] App., p. 83a.

[9] App., p. 92a.

Dr. Parks challenged her discharge in the courts. The challenge ultimately came before the Supreme Court of Michigan and was unsuccessful. *Detroit Board of Education v. Parks*, 98 Mich. App. 22 (1980), *affirmed*, 417 Mich. 268 (1983).

Following her discharge, Dr. Parks went to the Michigan Employment Security Commission (MESC) and applied for unemployment compensation benefits which she had accrued during her long years of service to the Detroit public schools. Dr. Parks' application for unemployment compensation was denied by the Michigan Employment Security Commission on the grounds that her refusal to pay the agency fee constituted a voluntary leaving of her job. In a split decision, the Supreme Court of Michigan affirmed the denial of the application for unemployment compensation on a different theory—that the refusal to pay the agency fee constituted misconduct.

Procedural Background

An unemployment commissioner initially decided, over the objections of the Detroit Board of Education, that Dr. Parks was eligible for unemployment compensation; and she was subsequently granted those benefits.[10]

Her employer asked for a redetermination, and in that redetermination her eligibility was affirmed.[11] The Board of Education then appealed the decision to a referee. The referee reversed the two prior determinations and held Dr. Parks disqualified pursuant to § 29(1)(a) of the Michigan Employment Security Act because she had voluntarily left her job. The referee also held that the mis-

[10] App., p. 96a

[11] App., p. 95a.

conduct section of the Act, § 29(1)(b), was inapplicable.[12] Dr. Parks appealed that decision, and the MESC Board of Review, in a split decision, affirmed the referee's decision.[13] The decision of the Board of Review was appealed to the Wayne County Circuit Court, which upheld the Board of Review.[14] The decision of the circuit court was then appealed to the Michigan Court of Appeals.[15] That court affirmed and its decision was appealed to the Supreme Court of Michigan. The Supreme Court of Michigan, in a split decision, affirmed the denial of the unemployment compensation, but held that the denial was proper because Dr. Parks' refusal to pay the agency fee constituted misconduct (contrary to the opinions of the agency and courts below that the conduct constituted a voluntary quit).[16]

REASONS FOR GRANTING THE WRIT

The decision of the Michigan Supreme Court conflicts with the recent decision of this Court in *Hobbie v. Unemployment Appeals Commission of Florida*, No. 85-993 (U.S., February 25, 1987). In addition, the decision conflicts with the cases decided by this Court dealing with compulsory agency fees. When this Court ruled in *Abood* that Dr. Parks had a First Amendment right to be free from supporting the union's political activities, that was the last time the judiciary protected her.

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[12] App., pp. 71a-76a.

[13] App. pp. 67a-69a.

[14] App. pp. 55a-66a.

[15] App. pp. 53a-54a.

[16] App., pp. 1a-52a.

On remand, the trial court ordered her to pay a fee equal to dues to the union and then exhaust the union's internal rebate procedure. When she rightly refused, the trial court dismissed her from the *Abood* case.[17] The Board then fired Dr. Parks from her job of 43 years for refusing to pay union fees. She was denied the right to pay the contested fees to an escrow account. She was given no information regarding how the union spent its money. Of course, the discharge was completely contrary to this Court's decisions in *Ellis v. BRAC*, 466 U.S. 435 (1984), and *Hudson v. Chicago Teachers Union*, _____ U.S. _____, 106 S. Ct. 1066 (1986).

After her discharge she applied for unemployment compensation benefits to help tide her over until she could find another job. Ultimately, she was denied these benefits. The Michigan Supreme Court, in a split decision, and over a blistering dissent, held that Dr. Parks' refusal to pay the disputed fees prior to a hearing constituted *misconduct*. That court held that this "misconduct" justified denying her the unemployment compensation benefits she had earned during long years of service to the state. The Michigan court's decision is clearly in conflict with this Court's decisions in *Abood*, *supra*, *Ellis*, *supra*, and *Hudson*, *supra*. As Justice Riley pointed out

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[17] On remand, the Wayne County Circuit Court required the *Abood* plaintiffs to utilize the Detroit Federation of Teachers' internal union rebate scheme. The plaintiffs did so with regard to one fiscal year, and the internal scheme took more than four years to exhaust. The Circuit Court then held that the scheme was constitutional and adopted the internal union tribunal's decision as to the amount of the fee without a trial *de novo*. Approximately 10 years after this Court handed down its landmark decision in *Abood*, there is, finally, as of March 1987, a settlement in the case. Dr. Parks' belief that her rights would be abrogated by paying the fee to the union has been demonstrated by the history of that case.

in her dissent from the Michigan Supreme Court decision, "Parks' actions, after remand from the United States Supreme Court in *Abood*, were based upon a meritorious First Amendment claim against her employer." App., p.42a. This Court recently pointed out in *Hobbie*, *supra*, the error of labeling and penalizing behavior dictated by the exercise of First Amendment religious beliefs as intentional misconduct. *Hobbie*, slip op. at 6, n.7. Therefore, this Court should not permit the Michigan Supreme Court to label the exercise of First Amendment free speech rights as "misconduct."

What has happened to Dr. Parks since she last left this Court calls for this Court to exercise its supervisory powers over the lower Michigan courts. With the increasing number of public employees subject to compulsory union fees and the rapidly developing constitutional law in this area, it is important for this Court to further delineate the relationship between state unemployment compensation laws and employees' exercise of their First Amendment right of dissent.

In addition to the complete conflict with this Court's agency fee decisions, the Michigan Supreme Court decision is in conflict with this Court's First Amendment decisions dealing with unemployment compensation. *Hobbie*, *supra*; *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board of Indiana*, 450 U.S. 707 (1981). *Sherbert* and *Thomas* involved the denial of unemployment compensation benefits to claimants who were unemployed because of conflicts between their First Amendment religious beliefs and available work. The only distinction between those cases and that of Dr. Parks is the phrase of the First Amendment that is relied upon. Dr. Parks was unemployed due to a conflict be-

tween her work and her First Amendment rights of free speech and free association. The claimants in *Sherbert* and *Thomas* found that their work conflicted with their First Amendment right of freedom of religion. There is no distinction between the exercise of a First Amendment free speech interest and freedom of religion interest that would permit the denial of unemployment compensation in the former but not the latter instance. In fact, this Court, in deciding *Sherbert*, relied in part on another freedom of speech case, *Speiser v. Randall*, 357 U.S. 513 (1958).

The *Sherbert* Court held that if a denial of unemployment compensation is to withstand constitutional scrutiny it must be because the disqualification of an individual as a beneficiary represents no infringement by the state upon the constitutional rights of the individual *or* because the burden on the First Amendment rights of the individual may be justified by a compelling state interest. *Sherbert*, at 403. Dr. Parks was discharged for failing to pay an agency fee that infringed upon her First Amendment rights. In *Abood*, *supra*, and *Hudson*, *supra*, the Supreme Court ruled that forced fee payments to a union by nonmembers impact on First Amendment rights. 106 S. Ct. at 1073. This is true even if the fee is limited to expenses of collective bargaining activities. In this case the impact is even greater since Dr. Parks objected to the fact that the fee was financing political activities and she was given none of the First Amendment procedural rights outlined by this Court in *Hudson*. The Michigan Supreme Court attempted to distinguish this case from *Thomas* by stating that the impact upon Dr. Parks' constitutional rights was minimal. This attempt to minimize Dr. Parks' First

Amendment rights is contrary to the decisions of this Court in *Abood, supra, Ellis, supra* and *Hudson, supra.* Those decisions hold that even an alleged "de minimus" violation of First Amendment rights must be rectified.[18] But de minimus or not, Dr. Parks' First Amendment rights were clearly infringed.

The second part of the *Sherbert* test examines whether the state has a compelling interest which will override Dr. Parks' First Amendment interests. Dr. Parks admits that the state may have a compelling interest that would allow her employer to compel her to pay an agency fee that was limited to a constitutionally permissible amount. However, the state can have no interest in violating the rights upheld in *Ellis* and *Hudson* by requiring Dr. Parks to pay the full amount of the contested fees to the union without any procedural protections. And just as important, the state has no interest in imposing a double punishment for the exercise of First Amendment rights, first discharging Dr. Parks and then denying her unemployment compensation benefits.

In *Abood, supra*, the Court found that the state had an important interest in requiring an employee to reimburse his union for its costs of collective bargaining on his behalf. 431 U.S. at 221-26. Thus, the state could allow a public employer to make the payment of such a fee a condition of employment. In this case the collective bargaining agreement made the payment of a service fee a condition of employment. Discharge was Dr. Parks' penalty for refusing to pay the agency fee. Once Dr. Parks was discharged, whatever legitimate interest the

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[18] Of course, Dr. Parks does not believe that this serious violation of her First Amendment rights can properly be labeled "de minimus".

state had in compelling her to pay an agency fee was fully satisfied. After the discharge occurred, the union no longer bore the burden of representing Dr. Parks. All of the remaining members of the bargaining unit were then financially supporting the union. The discharge of Dr. Parks fulfilled the state's interest in permitting an agency shop and extinguished any further state interest in penalizing Dr. Parks' non-support of the union. However, the state then went further. Through the operation of the Michigan Employment Security Commission it punished her a second time. It compelled her to choose between her unemployment compensation benefits and her First Amendment rights.

When Dr. Parks applied for unemployment compensation, a whole new question arose and a new balance came into play. Dr. Parks still retained her First Amendment rights, but the offsetting interest of the state was different.

The Michigan Supreme Court attempted to distinguish this case from *Sherbert* and *Thomas* by suggesting state interests that it claimed could justify the infringement of Dr. Parks' rights. This Court in *Hobbie* made it clear that such infringements by the state could be justified only by proof of a compelling interest. *Hobbie*, slip op. at 5.

The first interest that the state has alleged is in limiting unemployment compensation to those who are unemployed due to forces beyond their control. However, when the unemployment is the result of an exercise of a First Amendment right, concern over the number on the rolls of applicants is not, according to this Court's holding in *Thomas*, a sufficient justification to permit the denial of unemployment compensation. In that case the State of Indiana also claimed that the state's interest was in maintaining the integrity of the unemployment insur-

ance fund. This Court rejected that claimed state interest as insufficient to justify the burden placed on Thomas' First Amendment right of freedom of religion. *Thomas*, at 719-20. Similarly, that claimed interest cannot justify the infringement upon Dr. Parks' exercise of her freedoms of speech and association.

The second interest the Supreme Court of Michigan used to justify the denial of unemployment compensation to Dr. Parks is the claim that "[T]he state's interest in sound and balanced labor relations could be weakened if large numbers of workers displeased with union shop arrangements were able to have their period of unemployment financed by the state and their former employers." App., p.21a. There is no evidence in the record that large numbers of employees are willing to forgo regular paychecks in exchange for temporary unemployment checks just because they object to the union. In fact, there have been only a relatively small number of reported cases throughout the country involving employees who have risked discharge. Of the original plaintiffs in the *Abood* case, Dr. Parks was the only one that did not permit her constitutional rights to be abridged and was discharged for that stand. There is no evidence in the record to support the conclusion that granting unemployment compensation to employees discharged as a result of union security agreements would unbalance labor relations. Constitutional rights should not be abrogated based upon unsupported speculation about potential state benefits. When Dr. Parks was discharged, she was no longer a member of the bargaining unit and her collection of unemployment compensation could in no way affect the labor relations between her former employer and bargaining representative.

It is clear that the claimed interests of the state cannot

withstand the strict scrutiny standard mandated by this Court in *Hobbie*. In fact, the state has an interest in paying unemployment compensation benefits to one who finds herself without income after having been steadily and profitably employed for 43 years.[19]

Dr. Parks' First Amendment freedom to choose only associations of her choice is balanced against the state's interest in imposing the *additional* penalty of denial of unemployment compensation benefits beyond the penalty of the discharge. The "weights" on the constitutional scale are now obvious. The state has no interest in denying unemployment benefits to Dr. Parks. The scales weigh the state's interest in paying the benefits (the purpose for which the unemployment program was established) and the employee's First Amendment rights, *against* the state's interest in imposing a penalty for the exercise of First Amendment rights.

In weighing the state's interest against the individual's constitutional rights, it is clear that the state cannot satisfy even the "rational relationship" test, much less the test which is applied in the First Amendment context—*i.e.*, "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Furthermore, even if the state could show a compelling interest, it would still have to show that there was no alternative form of regulation which could both accomplish its objective and be less restrictive on Dr. Parks' rights. *Sherbert*, 374 U.S. at 407; *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960). The state of Michigan has not done so.

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[19] MCLA § 421.2; MSA § 17.502.

Because Dr. Parks was forced to choose between her First Amendment rights and unemployment compensation, the state should not be permitted to deprive her of unemployment compensation. The decision of the Michigan Supreme Court is in conflict with the decisions of the United States Supreme Court in *Hobbie*, *Hudson*, *Ellis*, *Abood*, *Thomas v. Review Board of Indiana*, and *Sherbert*.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted and the decision of the Supreme Court of Michigan should be summarily reversed and remanded in light of *Hobbie*.

Respectfully submitted,

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APPENDICES

PARKS v EMPLOYMENT SECURITY COMMISSION
CITY OF SAGINAW v LINDQUIST
DOLCE v FORD MOTOR COMPANY

Docket Nos. 73010, 75474, 75964. Argued June 5, 1986 (Calendar Nos. 11-13). Decided December 26, 1986.

Anne B. Parks was discharged by the Detroit Board of Education for refusing to pay an agency shop fee as required by a collective bargaining agreement between the board and the district teachers' union. Parks applied for, but was denied, unemployment compensation benefits by a hearing referee on the ground that she left work voluntarily without good cause attributable to the employer. The board of review affirmed. The Wayne Circuit Court, Thomas J. Brennan, J., affirmed the decisions of the referee and the board. The Court of Appeals, J.H. GILLIS, P.J., and GRIBBS and GAGE, JJ., affirmed in a memorandum opinion (Docket No. 66385). The plaintiff appeals.

Nancy A. Lindquist was discharged by the City of Saginaw for failing to maintain her permanent bona fide residence within the corporate limits of the city as required by the city's administrative code. Lindquist applied for and received unemployment compensation benefits. On appeal, a hearing referee denied benefits on the ground that she was discharged for misconduct connected with her work because she failed to meet one of the requirements of the employer's rules. The board of review agreed that the residency requirement was violated, but concluded that it was not work-connected. The Saginaw Circuit Court, Fred J. Borchard, J., af-

firmed, finding that the claimant's action did not constitute disqualifying misconduct. The Court of Appeals, D.E. HOLBROOK, P.J., and CYNAR and GILLESPIE, JJ., reversed, holding that the claimant had violated the residency requirement in that there was an intentional and substantial disregard of her obligation to her employer which could be considered misconduct (Docket No. 67479). The defendant appeals.

Dominick Dolce was mandatorily retired from the Ford Motor Company. He claimed and was found eligible for unemployment benefits. The board of review reversed, finding that mandatory retirement as required under a collective bargaining agreement constituted a voluntary leaving of employment. The Wayne Circuit Court, Joseph B. Sullivan, J., affirmed. The Court of Appeals, MACKENZIE, P.J., and WARSHAWSKY, J. (WAHLS, J., dissenting), affirmed in an unpublished opinion per curiam (Docket No. 68415). Sophia Dolce, personal representative of the estate of Dominick Dolce, appeals.

In opinions by Justice BRICKLEY, joined by Chief Justice WILLIAMS and Justice ARCHER, and by Justices CAVANAGH, BOYLE, and RILEY, the Supreme Court *held*:

In *Parks* and *Lindquist*, the claimants were disqualified from receiving benefits; in *Dolce*, the claimant was entitled to benefits.

Justice BRICKLEY, joined by Chief Justice WILLIAMS and Justice ARCHER, stated that a claimant is disqualified from receiving unemployment compensation benefits

under § 29 of the Michigan Employment Security Act where the claimant leaves work voluntarily without good cause attributable to the employer or is discharged for work-connected misconduct.

1. Work-connected misconduct is conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of employees. Such misconduct is not limited to acts occurring at the workplace and may extend to actions outside the workplace.

2. In *Parks*, the claimant's failure to pay agency shop fees after receiving notice from her employer showed a wilful disregard of the employer's interest. The claimant did not have a constitutional right not to pay the required fees, and any effect on her First Amendment interests was outweighed by the state's interest in not using its moneys to pay unemployment benefits to persons who are disqualified under the act.

3. In *Lindquist*, the failure of the claimant to comply with her employer's residency requirement constituted a wilful disregard of her employer's interest and thus was work-connected. She was well aware of the residency requirement as a condition of employment as evidenced by her attempt to sustain the appearance of residency within the city.

4. In *Dolce*, the claimant did not leave work voluntarily, but was forced to leave pursuant to mandatory retirement provisions of a collective bargaining agreement. The collective bargaining process is too remote

from individual employees to serve as a basis for determining whether a leaving of work was voluntary. Unlike *Parks* and *Lindquist*, there was no wilful disregard of a condition of employment. The act directs inquiry to whether a worker left work voluntarily and does not address agreements between employers and third parties. As long as an employee does not voluntarily retire and otherwise meets the eligibility requirements of § 28 of the act, the employee will not be disqualified from receiving unemployment benefits when forced to retire under the terms of a collective bargaining agreement.

Justice RILEY, while concurring in the result in *Dolce* and *Lindquist*, stated that in *Parks* neither of the benefit-disqualification provisions enumerated in § 29 of the Employment Security Act is applicable under the particular facts of the case, requiring reversal of the decision of the Court of Appeals. Under the act, a person may be disqualified for leaving work voluntarily without good cause attributable to the employer or where discharged for misconduct connected with the work or for intoxication at work. Application of either provision requires a careful evaluation of the claimant's conduct within the factual circumstances of the case. Parks' justifiable actions were based on a meritorious claim against her employer and did not constitute misconduct under § 29(1)(b) or a voluntary leaving without good cause attributable to her employer under § 29(1)(a). Both the circuit court and the Court of Appeals erred in failing to consider the particular circumstances which led to her discharge.

Justice LEVIN concurred in the result reached by Justice RILEY.

Justice BOYLE, concurring in part and dissenting in part, stated that in these cases it is inappropriate to engage in a strained construction of the requirement that disqualification on the basis of misconduct be work connected. In *Parks* and *Lindquist*, the claimants left work voluntarily, in *Dolce*, the claimant's retirement was for reasons beyond his control.

Justice CAVANAGH, concurring in part and dissenting in part, stated that the claimants should be disqualified for benefits on the basis of voluntarily leaving work under § 29(1)(a).

Parks and *Lindquist*, affirmed.

Dolce, reversed.

139 Mich App 515; 362 NW2d 771 (1984) reversed.

BRICKLEY, J. In these three consolidated cases we are asked to consider under what circumstances the disqualifying provisions of § 29 of the Michigan Employment Security Act apply so as to disqualify a claimant from receiving unemployment benefits.

PARKS

Appellant Anne B. Parks began working for the Detroit Board of Education in 1935. In 1969, the Detroit Federation of Teachers was recognized by the employer as the bargaining unit of the employees. Under the collective bargaining agreement reached between the employer and union, each covered employee was required to pay union membership dues or agency shop service fees. Also, the agreement required the employer, upon notification and request by the union, to notify the

employee of termination within sixty days if the dues were not paid. The agreement required the employer to terminate an employee who did not pay the fees within the sixty-day period. Appellant Parks was one of the covered employees, and thus the contract under which she worked required her to pay a service fee. Due to personal beliefs, she objected to the paying of service fees. Along with other employees, she challenged the compulsory service fee in a lawsuit initiated in 1969. In *Abood v Detroit Bd of Ed*, 431 US 209, 239; 97 S Ct 1782; 52 L Ed 2d 261 (1977), reh den 433 US 915 (1977), the United States Supreme Court held that it is constitutionally permissible to require employees to pay fees for the support of a union's activities in the areas of collective bargaining, contract administration, and grievance adjustment.[1]

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[1] Without further comment, plaintiff, in the facts statement of her brief, states that she was willing to pay the collective bargaining share of the agency fees if they were separated from that portion of dues related to political and other activities not constitutionally extractable under *Abood*. The intended implication of this statement is unclear. However, we note that the propriety of plaintiff's discharge is not at issue in this case.

Abood was remanded by the United States Supreme Court for the purpose of giving the parties an opportunity to pursue a procedure for extrapolating the constitutionally permissible portion of their dues. Parks was dismissed from that action on remand for lack of standing when she refused to adhere to the procedures for collection of agency fees. She did not appeal from that dismissal. It may be that plaintiff's argument as to her discharge for failure to pay agency fees escaped Court of Appeals review in *Detroit Bd of Ed v Parks*, 98 Mich App 22; 296 NW2d 815 (1980) (see plaintiff's application for rehearing), but it was without question not raised before this Court in that case. For a history of those proceedings, see *Detroit Bd of Ed v Parks*, 417 Mich 268, 270, n1; 335 NW2d 641 (1983).

Similarly, during oral argument in the instant case, plaintiff's counsel

After the *Abood* opinion was issued, appellant did not pay the service fee or any portion thereof to the union. Pursuant to the collective bargaining agreement, the union notified the employer that the fees had not been paid. The employer asked appellant to pay the fee, and, when it was not paid, the union requested that the employer issue a sixty-day termination notice. In 1978, the employer notified appellant that her employment would be terminated on March 11, 1978, unless the fees were paid before then. When the fees were not paid, appellant was discharged on that date.

This Court upheld the validity of the discharge. *Detroit Bd of Ed v Parks*, 417 Mich 268; 335 NW2d 641 (1983). Appellant then filed a claim for unemployment benefits. The MESC initial determination was that appellant was not disqualified for benefits due to misconduct. The employer sought redetermination on the ground that claimant voluntarily left her job, but the MESC claims examiner affirmed the original determination, against finding no disqualification for misconduct. The employer then appealed to the referee who reversed and held that

> claimant's separation from her employment was a result of an action instituted by herself and is therefore a voluntary leaving without good cause attributable to the employer.

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explicitly noted that Dr. Parks was not trying to relitigate *Abood* or challenge her discharge. He further admitted that the agency fee is constitutional and that plaintiff's argument was not meant to suggest that the discharge was unlawful. Parks' argument, instead, was directed solely at the issue addressed in this opinion.

Since plaintiff did not before this Court pursue the constitutional status of her discharge after her dismissal from *Abood* and is not contesting it now, we, for purposes of the disposition of this case, assume no constitutional infirmity in her discharge.

The referee further found that the disqualification provision of § 29(1)(b) (misconduct) was inapplicable. This decision was affirmed by the board of review. The dissenting board member believed that appellant did not leave her work voluntarily because she was terminated. He also believed appellant was not disqualified for misconduct. In the opinion of the dissenting member, appellant's refusal to pay agency service fees was, at most, a good-faith error in judgment or discretion which does not amount to misconduct under the act.

The circuit court affirmed, agreeing that there was a voluntary leaving because "claimant's loss of prerequisites for continued employment (i.e., the payment of the agency shop fees) was not the result of a *negligent* act of omission, but rather the product of a *voluntary choice* with knowledge of the consequences." (Emphasis in the original.) The court thus concluded that the board's findings were supported by competent, material, and substantial evidence. The Court of Appeals, in a brief memorandum opinion, also affirmed on this basis. We granted claimant's application for leave to appeal. 423 Mich 854 (1985).

LINDQUIST

Appellant Nancy A. Lindquist was hired by the City of Saginaw on August 23, 1971. On February 5, 1981, she was discharged from her employment by the city because she failed to maintain her permanent bona fide residence within the corporate limits of the City of Saginaw in accord with Chapter 3, § 115 of the Saginaw Administrative Code. Section 115 of the code provides:

> Each city employee shall maintain a permanent and bona fide residence within the corporate limits

> of the City. Any employee who fails to comply with the provisions of this section shall be deemed to have abandoned such employment and shall thereafter receive no salary or wages from the City.

After being terminated, appellant filed an application for unemployment benefits with the MESC on February 10, 1981. The commission initially determined that she was ineligible for benefits, but upon redetermination ruled that she was not disqualified for misconduct because

> [t]he rule regarding residency bears no relation to the work to be performed and therefore any violation of the rule cannot be considered misconduct in connection with the work . . . . It is determined that claimant's discharge was for reasons other than misconduct in connection with the work . . . .

The city then appealed to the referee who made the following findings of fact:

> In January 1981 the employer was notified that the claimant was not complying with Section 115 of the Code. An investigation was conducted. The claimant indicated to the employer that she resided at 3122 Fulton Street, Saginaw, Michigan. The investigation disclosed that on October 21, [1977] the claimant moved from 3717 Huntly Road, Saginaw, Michigan to 3122 Fulton Street, Saginaw, Michigan. Both of these addresses are located within the corporate limits of the City of Saginaw. The investigation also disclosed that the property on Fulton Street in 1977 was owned by a Mr. Carl Brown; that in 1978 the property on Fulton Street was owned by Gladys Brown, and in 1979-1980 the home on Fulton Street was vacant. Later, on the

death of Gladys Brown, the property on Fulton Street became the property of Barry Brown. In early February 1981 the property on Fulton Street was placed for sale.

Four years prior to the time of separation claimant and her husband sold their home. Her husband and children moved to 2657 Birch Point, Lupton, Michigan and claimant began to reside with her aunt at 3122 Fulton Street. The claimant traveled each weekend to Lupton, Michigan and remained with her family. The claimant also went to Lupton during the week in the event of her children's illness or to engage in school or other activities.

The claimant's aunt died in 1979 and claimant continued to reside at the Fulton Street address to prevent the building from being vandalized. Claimant paid no rent to Mr. Barry Brown, the executor of the estate of Gladys Brown. The claimant received mail at the Fulton Street address. The claimant voted in the City of Saginaw, and on her drivers license she lists the Fulton Street address.

The referee found that appellant was not a resident of Saginaw:

In this case, the claimant was not a bona fide resident because her address on Fulton Street was not her true home. Her true home was in Lupton, Michigan. It was at her home in Lupton, Michigan that her children and husband lived and where she intended to reside. She only lived in Saginaw for the purpose of being close to work. In addition, her address on Fulton Street was not her fixed home. It was her temporary home while she was away from her true home in Lupton. Her intent was always to

> return to Lupton. Nor was her home in Saginaw a permanent home. She never intended to remain at that place indefinitely into the future until a new residence was obtained because she already had a residence in Lupton. If the adage is true that "A person's home is where their heart is," claimant's home was in Lupton because her heart was always with her husband and children. Also the intent of the claimant was to reside on Fulton Street only in an attempt to meet the requirements of the city charter. The claimant never intended the Fulton Street address to be her permanent address. It was a place to stay while she was away from Lupton. Thus, it was not a bona fide residence.

The referee concluded that appellant was discharged for misconduct connected with her work because she "failed to meet one of the requirements of the employer's rules . . . ."

Upon the claimant's appeal, the board of review agreed that the residency requirement was violated, but concluded that even if this constituted misconduct, it was not work-connected. The "violation of the requirement did not occur on the job, nor did it occur because of problems in connection with work or work performance."

The dissenting member of the board of review believed that the misconduct was work-connected. He opined that the majority interpreted the "work connected" requirement too narrowly when it held that the misconduct must relate to work performance or an on the job violation. Appellant also could have been disqualified for voluntarily leaving her employment in the view of the dissenting member. He reasoned that there was not a constructive voluntary leaving because claimant was

aware of the city's administrative code provision which deemed a violation of the residency requirement to be an abandonment of employment.

The circuit court agreed with the board of review that appellant's actions did not constitute disqualifying misconduct within the meaning of the MESA. Summary judgment was entered in appellant's favor.

The Court of Appeals reversed. 139 Mich App 515; 362 NW2d 771 (1984). The panel affirmed the finding that appellant violated the residency requirement because it was supported by competent, material, and substantial evidence, and further concluded that

> there was an intentional and substantial disregard of [appellant's] obligation to her employer which could be considered misconduct. [139 Mich App 522.]

The Court of Appeals also determined that claimant was ineligible for unemployment benefits because she voluntarily left work without good cause attributable to the employer.

> Loss of qualification for employment because of residency is in the control of the employee and falls within the meaning of "voluntary leaving without good cause attributable to the employer or employing unit" and is not "constructive voluntary leaving." [139 Mich App 523.]

This Court granted claimant's application for leave to appeal on December 11, 1985. 424 Mich 856 (1985).

DOLCE

Appellant [2] Dominick Dolce worked full time for Ford

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[2] The plaintiff-appellant, Sophia Dolce, was substituted as plaintiff-

Motor Company from April 20, 1964, through November 30, 1977. Appellant was a member of the United Auto Workers Union and thus worked under the terms contained in the collective bargaining agreement between Ford and the UAW. The agreement provided:

> An employee automatically shall be retired under the Plan on the earlier of:
>
> (i) the first day of the month following his 65th birthday.
>
> * * *
>
> Notwithstanding the foregoing provisions the Company may allow an employee to delay his retirement beyond age 65 if the employee is on a skilled classification for which the Company determines that there are [sic] an insufficient number of available, qualified persons to meet its needs adequately, but not beyond the earlier age of 68 or the time the Company determines that it can otherwise adequately meet its needs on his classification.

Appellant was allowed to work three years beyond the ordinary retirement age of sixty-five, but on November 30, 1977, he was forced to leave work due to his age. The referee found that appellant was able "to perform suitable full-time work of a character which he is qualified to perform by past experience or training, and of a character generally similar to the work" performed for Ford. MCL 421.28(1)(c); MSA 17.530(1)(c).

Appellant thereafter filed an application with the

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appellant as the personal representative for her deceased husband on motion granted by this Court. For convenience, appellant will mean either the deceased or his personal representative.

MESC, seeking unemployment insurance benefits. The hearing referee found that appellant was eligible for benefits and not otherwise disqualified. The board of review reversed and, relying on *Applegate v Palladium Publishing Co*, 95 Mich App 299; 290 NW2d 128 (1980), lv den 409 Mich 904 (1980), held that "[m]andatory retirement provisions under a collective bargaining agreement constitute a voluntary leaving of employment . . . ." The Wayne Circuit Court affirmed the decision of the board of review, believing itself bound to that conclusion by *Applegate*, *supra*. In a divided opinion, the Court of Appeals affirmed. Two members of the panel agreed with the conclusion reached in *Applegate* and also noted that the Legislature had amended § 29(1)(a) subsequent to that case (1982 PA 535), but did not change the result of *Applegate*. They viewed this as legislative acquiescence in the interpretation reached in *Applegate*. The dissenting member of the panel wrote that the rationale used in *Applegate* was rejected by this Court in *MESC v Vulcan Forging Co*, 375 Mich 374; 134 NW2d 749 (1965). Accordingly, he believed that *Applegate* was wrongly decided.

After the Court of Appeals denied rehearing, we granted the claimant's application for leave to appeal. 424 Mich 856 (1985).

ANALYSIS

In 1936, the Michigan Employment Security Act became law. Section 2 of that act expresses the legislative policy sought to be achieved by the act.

> The legislature acting in the exercise of the police power of the state declares that the public policy of

> the state is as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life. Employers should be encouraged to provide stable employment. The systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves *to be used for the benefit of persons unemployed through no fault of their own*, thus maintaining purchasing power and limiting the serious social consequences of relief assistance, is for the public good, and the general welfare of the people of this state. [MCL 421.2; MSA 17.502. Emphasis added.]

Section 29 of the act establishes instances in which those seeking unemployment benefits are disqualified.

> (1) An individual shall be disqualified for benefits in the following cases in which the individual:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit. However, if the individual has an established benefit year in effect and, during that benefit year, has left unsuitable work within [60] days after the beginning of that work, such leaving shall not be disqualifying.
>
> (b) Was discharged for misconduct connected with the individual's work, or for intoxication while

> at work unless the discharge was subsequently reduced to a disciplinary layoff or suspension.

The appellant-claimant in *Lindquist* claims that she is not disqualified under either provision. We agree with the Court of Appeals that her violation of the residency requirement constituted misconduct within the meaning of the statute and thus do not decide whether there was a voluntary leaving.[3]

In *Carter v MESC*, 364 Mich 538, 541; 111 NW2d 817 (1961), this Court adopted the following definition of misconduct:

> "The term 'misconduct' . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

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[3] We do note, however, that the characterization of the Saginaw City Charter that the failure to maintain a residency in the city is an abandonment of employment would not be relevant to resolving the question whether there was a voluntary leaving. A discharge for misconduct or other reason cannot be turned into a voluntary leaving merely by labeling it so.

We believe that appellant's failure to comply with the residency requirement constitutes misconduct within this definition.[4] The appellant's actions amounted to conduct showing a wilful disregard of her employer's interest. The employer has a strong interest in seeing that its rules are uniformly applied and followed. The employer had the right to expect that its employees would abide by the residency requirement.[5] Appellant had a duty and obligation to her employer to maintain her residency within the city limits. She was well-aware of this condition of her employment as evidenced by her attempt to sustain the appearance of residency in the city. That the employer chose to make this requirement a condition of continued employment tends to show the importance of the rule to the employer's interest. See *Rodgers v Commonwealth*, 40 Pa Commw 552; 397 A2d 1286 (1979).

Furthermore, we hold that the misconduct in this case was work-connected. We do not believe that the phrase "work connected" should be so narrowly construed so as to apply to only misconduct occurring at the workplace. This construction would allow employees to engage in acts inimical to their employer's legitimate interest out-

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[4] Appellant further maintains that there was no violation of the residency requirement. The referee found as a matter of fact that appellant never intended to make the Fulton Street house her permanent home and that her intent was to return to Lupton to be with her husband and children. This conclusion is supported by competent, material, and substantial evidence on the whole record and is not contrary law. It is thus sustained. Const 1963, art 6, § 28; MCL 24.306(1)(d), 423.216; MSA 3.560(206)(1)(d), 17.455(16).

[5] The wisdom or validity of the residency requirement is not before us, but we do note that it is not unreasonable that a municipal government would limit the benefits of employment to those who reside within its borders and pay its taxes.

side the work place and yet receive unemployment benefits when they are justifiably discharged. There are some occupations and professions in which the employer is entitled to expect certain standards of behavior both in and out of the workplace. Actions outside the workplace may, at times, be more detrimental than those that occur on the job. The residency requirement here was part of the city's administrative code and applied to all employees who worked for the city. We find that the violation of this provision was serious enough to constitute misconduct as that term has been interpreted and also conclude that the violation was sufficiently work-connected to justify a denial of unemployment benefits.[6]

In *Parks*, we also believe that the employee's actions constituted misconduct and do not decide whether they would amount to a voluntary leaving. Appellant's failure

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[6] The dissent cites *Reed v Employment Security Comm*, 364 Mich 395, 396; 110 NW2d 907 (1961), to support its view that plaintiff's refusal to abide by the residency ordinance was, even if misconduct, not "work related," as § 529(1)(b) requires. In *Reed*, the employer established a rule "that an employee would be discharged from employment if a second writ of garnishment of his wages were served upon the company. Within a period of 9 months, 4 garnishments of plaintiff's wages were served on it. In consequence, he was discharged."

This Court held that, while plaintiff's failure to pay his debts may have been wrong, it "was in no wise connected with his work, even though the consequences might in some manner affect his employer." 364 Mich 397.

In this instant case, the "wrong" is not directed at third parties, but directly and solely at the interest of the municipal employer, which is supported by the taxes of its constituents and wishes to provide employment only to its constituents. While a failure to discharge third-party debts cannot be construed as "work-related," the purposeful refusal to adhere to an ordinance in which the municipality, as an employer, has the sole direct interest cannot, in our view, be seen as anything but "work-related."

to pay the fees was based on her dispute with the union. No matter what the merits of this dispute are, her failure to pay any fee whatsoever was clearly a wilful disregard of the employer's interest. The employer would have been in breach of its contract had it not terminated appellant. The employer had the right to expect that the fees would be paid. When they were not, the union exercised its contract rights and requested that the employer either collect the appellant's fees or terminate her. Appellant's continuing refusal to pay the fees even after receiving the termination notice put the employer in a position which would have compelled it to be in breach of its contract with the union had it not terminated her. This is sufficient to constitute work-connected misconduct.

We are not persuaded that appellant's "good faith" dispute concerning the union's ability to collect the fees is enough to make her action not misconduct. Appellant's misconduct was intentional in the sense that she intentionally did not pay the fees. Thus, even if she had a good-faith belief that the fees need not have been paid, her intentional act of not paying them after receiving notice from her employer showed a wilful disregard of the employer's interest.

We also conclude that, contrary to appellants [*sic*] assertion, there is no constitutional violation in the denial of unemployment benefits under the circumstances of the case. In *Abood*, *supra*, the Court held that the constitution was not violated by the forced collection of fees by the union as long as the fees were used in the course of its duty as the exclusive collective bargaining representative. The Court also held, however, that there was an "impact" on First Amendment interests in the union shop arrangement

> [t]o compel employees financially to support their collective-bargaining representative has an *impact* upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent *might well be thought, therefore, to interfere in some way* with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. [431 US 222. Emphasis added.]

This "impact" on constitutional rights was "constitutionally justified" by the "important contribution of the union shop to the system of labor relations established by Congress." *Id.*

We hold that in this case the minimal effect on appellant's First Amendment interests do not make the denial of unemployment benefits unconstitutional. We stress that appellant did not under *Abood* have a constitutional *right* not to pay the collective bargaining agency fees. The Supreme Court has only held that the forced pay-

ment of such fees may create a First Amendment "impact" or an "interference" with the freedom to associate. Thus, the requirement to pay agency fees does not, in our view, directly confront a constitutional right as was the case in *Thomas v Review Bd Indiana Employment Security Div*, 450 US 707; 101 S Ct 1425; 67 L Ed 2d 624 (1981), where an employee who quit rather than violate his religious convictions was found to have been unconstitutionally denied unemployment benefits.

The state has an obvious interest in not using its moneys to pay unemployment benefits to those who are disqualified under the MESA. Also, the state has an interest in protecting employers from being required to pay a percentage of unemployment benefits to all those who object to complying with the employers [*sic*] policy.

The policy of the MESA embodied in § 2 and disqualifying provisions in § 29 manifest the state's interest in reserving unemployment benefits for those who are unemployed due to forces beyond their control. Also, the state's interest in sound and balanced labor relations could be weakened if large numbers of workers displeased with union shop arrangements were able to have their period of unemployment financed by the state and their former employers. We hold that any effect on appellant's First Amendment interest is outweighed by the state's interest in upholding the denial of benefits in this case.

In *Dolce*, the misconduct-disqualifying provision of the statute is not relevant, and the only issue is whether the appellant left work voluntarily within the meaning of § 29(1)(a).

Other jurisdictions that have addressed this issue on the basis of disqualifying language similar to that in Michigan's statute have split. The leading case holding that there is no voluntarily [*sic*] leaving when an employee is mandatorily retired pursuant to a collective bargaining agreement is *Campbell Soup Co v Employment Security Bd of Review*, 13 NJ 431; 100 A2d 287 (1953). The majority of cases since *Campbell* have followed it when faced with the same facts and similar statutory language. *Reynolds Metals Co v Thorne*, 41 Ala App 331; 133 So 2d 709 (1961), cert den 272 Ala 709; 133 So 2d 713 (1966); *Employment Security Comm v Magma Copper Co*, 90 Ariz 104; 366 P2d 84 (1961); *Jenkins v Review Bd of Indiana Employment Security Div*, 138 Ind App 12; 211 NE2d 42 (1965); *Warner Co v Unemployment Compensation Bd of Review*, 396 Pa 545; 153 A2d 906 (1959); *Southwestern Bell Telephone Co v Employment Security Bd of Review*, 210 Kan 403; 502 P2d 645 (1972); *St Joe Paper Co v Gautreaux*, 180 So 2d 668 (Fla App, 1965); *Publishers Paper Co v Morgan*, 10 Or App 94; 498 P2d 798 (1972); *Duval Corp v Employment Security Comm*, 83 NM 447; 493 P2d 413 (1972). The leading case holding that there is a voluntary leaving under these circumstances is *Bergseth v Zinsmaster Baking Co*, 252 Minn 63; 89 NW2d 172 (1958). Cases following *Bergseth* include: *Kentucky Unemployment Ins Comm v Kroehler Mfg Co*, 352 SW2d 212 (Ky, 1961); *Lamont v Director of the Div of Employment Security*, 337 Mass 328; 149 NE2d 372 (1958); *Ivy v Dudley*, 6 Ohio St 2d 261; 217 NE2d 875 (1966); *McDonnell Douglas Corp v Labor Industrial Relations Comm*, 592 SW2d 295 (Mo App, 1979).

The *Campbell* opinion reasoned that the unemployment statute is remedial in nature and should be liberally construed. The court also noted that an understanding as to the duration of employment should not mean the employee's termination at the end of that period is voluntary. Employees are sometimes forced to accept jobs which their employers tell them at the time will engage their services for only a specific period. The voluntary acceptance of such work, knowing in advance its fixed duration, does not transform the termination at the agreed time into a voluntary leaving.

In *Warner, supra*, the court reasoned that an employee should not lose a statutory right to which he would otherwise be entitled merely because of a collective bargaining agreement between the union and employer. The theory that the employee has voluntarily agreed to quit cannot govern the determination under the statute because the pressures of the collective bargaining process are so complex. Looking to the collective bargaining process, rather than to the termination, would require an inquiry in each case to determine the position of each side at the bargaining table and even then a clear cut answer would probably not appear.

The *Bergseth* court reasoned that the employee had voluntarily left employment because of the union's agreement with the employer. The employees elected to have a union be their representative with the employer and thus gave up their rights to deal individually with the employer. Any act by the bargaining agent is deemed to be a voluntary act of each member of the union which forecloses any subsequent claim by an employee that actions which are binding on him under the terms of the collective bargaining agreement are involuntary.

We have reviewed the decisions from other jurisdictions and conclude that the result reached by *Campbell* and the cases following it is more likely the result intended by the Legislature in the Michigan statutory scheme.[7] We do not believe that the drafters intended to deny benefits from persons unemployed due to being mandatorily retired. We recognize that under Michigan law the union is the collective bargaining agent for all the employees and in many respects the employee is bound by and accountable for the actions of its bargaining agent. However, for purposes of determining voluntariness under the MESA, the collective bargaining process is too remote from the individual employees who come and go under it to allow those legislative presumptions under the state's scheme of labor law to transform a forced retirement into a voluntary leaving.

The statute disqualifies those who have left work voluntarily. Dolce did not leave work voluntarily, but was forced to leave. Unlike, Parks and Lindquist, who wilfully disregarded a condition of employment, Dolce was helpless to stave off the aging process and his eventual termination. The presence of a union agreement with the employer does not change the relationship between the employee and employer with respect to this statutory inquiry. The language of the statute directs the inquiry to whether the worker left voluntarily and does not address any agreements between the employer and third parties.

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[7] MCL 421.27(f); MSA 17.529(f) deals with the payment of unemployment benefits to retired persons. Nothing in this section suggests an intent that the disqualifying provisions of § 29 are applicable to forced retirement situations. If the Legislature intends to have persons forced to retire disqualified under the voluntary leaving provision, its intent must be made more clear.

As long as an employee does not voluntarily retire and otherwise meets the eligibility requirements of § 28 of the MESA, he will not be disqualified from receiving unemployment benefits when forced to retire under the terms of a collective bargaining agreement.

The judgment of the Court of Appeals in *Dolce* is reversed and the case is remanded for proceedings consistent with this opinion.

The judgment of the Court of Appeals is affirmed in *Parks* and *Lindquist*.

WILLIAMS, C.J., and ARCHER, J., concurred with BRICKLEY, J.

RILEY, J. (*concurring in part and dissenting in part*). The common issue presented in these consolidated appeals concerns the construction and application of § 29(1)(a) of the Michigan Employment Security Act. Additionally, in *Lindquist*, the application of § 29(1)(b) is implicated, and in *Parks*, an independent constitutional question is raised.

I concur in the result in Justice BRICKLEY's opinion in *Dolce* and *Lindquist*. I respectfully dissent in *Parks*.

I

The first two disqualification provisions enumerated in § 29 of the Employment Security Act provide:

> (1) An individual shall be disqualified for benefits in the following cases in which the individual:
>
> (a) Left work voluntarily without good cause attributable to the employer . . . .

> (b) Was discharged for misconduct connected with the individual's work, or for intoxication while at work . . . . [MCL 421.29; MSA 17.531.]

While I disagree with Justice BRICKLEY's application of § 29(1)(b) in *Lindquist*, I would concur in the decision to affirm upon the basis of the Court of Appeals application of 29(1)(a).[1]

Justice BRICKLEY's conclusion that an employee's failure to comply with an employment rule which may be viewed as a condition of employment or rule of selection (i.e., residency requirement or compulsory agency fee payments), without regard to the particular circumstances, constitutes "misconduct connected with the individual's work" within the meaning of § 29(1)(b), is problematic and requires an expansive construction of that disqualifying provision. That expansive construction effectively vitiates the inherent scienter element from the definition of "wilful misconduct" as defined in *Carter v MESC*, 364 Mich 538, 541; 111 NW2d 817 (1961), and by the courts of other jurisdictions construing similar disqualification provisions.[2] Moreover, Justice BRICKLEY's analysis substantially ignores the statutory require-

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[1] The Court of Appeals, reversing the decisions of the Circuit Court and the MESC Board of Review, found that Lindquist's actions "could be considered misconduct." The Court also held that Lindquist's failure to comply with the residency requirement constituted a "voluntary leaving without good cause attributable to the employer" within the meaning of § 29(1) (a). 139 Mich App 515, 522-523; 362 NW2d 771 (1984).

[2] See Packard, *Unemployment without fault: Disqualifications for unemployment insurance benefits*, 17 Vill L R 635 (1972); Kempfer, *Disqualifications for voluntary leaving and misconduct*, 55 Yale L J 147 (1945).

ment that such misconduct be "connected with [the individual's] work." See *Reed v Employment Security Comm*, 364 Mich 395, 396; 110 NW2d 907 (1961).

Every American jurisdiction has similar disqualification provisions within their employment security laws.[3] The courts of numerous jurisdictions have considered the application of those provisions in cases in which an employee has failed to comply with a nonwork-performance condition of employment or rule of selection, including the nonpayment of compulsory union dues and voluntary resignations because of the change of location of residency.[4] It is significant to note that those reported decisions have considered the applicability of the "voluntary leaving without good cause" disqualification as opposed to the disqualification for "work-connected misconduct" in such cases.

In any event, the particular circumstances of each case must be considered in determining the applicability of either disqualifying provision. The application of § 29(1)(a) or (b) requires an inquiry entirely separate from whether the individual was "justifiably discharged."

In *Lindquist*, although the claimant did not resign because of the change of location of her residence, I would affirm the decision of the Court of Appeals that her failure to sufficiently comply with the residency requirement, which was a condition of her employment,

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[3] See Kempfer, n 2.

[4] See Anno, *Termination of employment as a result of union action or pursuant to union contract as "voluntary" for purposes of unemployment compensation benefits*, 90 ALR2d 835, 851; Anno: *Eligibility for unemployment compensation as affected by voluntary resignation because of change of location of residence*, 21 ALR4th 317.

constituted a "voluntar[y] [leaving] without good cause attributable to the employer," within the meaning of § 29(1)(a). While I agree that the referee's conclusions concerning the definition of "residency" and whether the claimant had failed to maintain a bona fide residence within the corporate limits of the City of Saginaw are supported by competent, material, and substantial evidence and is not contrary to law, I am not persuaded that the claimant's attempt to comply with her employer's residency requirement constituted wilful "misconduct connected with [her] work" within the meaning of § 29(1)(b). Rather than expansively construing § 29(1)(b) to include cases in which an employee "failed to meet one of the requirements of the employer's rules . . . ," without regard to whether the "violation of the requirement . . . occur[red] on the job, . . . [or] because of problems in connection with work or work performance,"[5] I would simply treat the claimant as if she had done that which was presumably required under the circumstances—resigned because of the relocation of her permanent residence. In construing § 29(1)(a) as applicable in such cases, I would emphasize that, unlike some of the corollary provisions of other jurisdictions, § 29(1)(a) is applicable to individuals who leave work "voluntarily without good cause *attributable to the employer* . . . ." (Emphasis added.)[6]

II

The appellant-claimant in *Parks* was disqualified under § 29(1)(a). In reaching that conclusion, the referee,

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[5] *Ante*, pp 232, 233.

[6] Pursuant to the similar disqualifying provisions of some jurisdictions, "good cause" need not be "attributable to the employer." See Anno; 21 ALR4th 317. See also Packard, n 2 *supra*, 641.

reversing the initial determination, expressly found that § 29(1)(b) (misconduct connected with the individual's work) was inapplicable. Parks' disqualification under § 29(1)(a) was affirmed by the MESC board of review, the trial court, and the Court of Appeals. Justice BRICKLEY does not review the application of § 29(1)(a), but, instead, concludes that Parks' actions constituted "misconduct connected with [her] work" within the meaning of § 29(1)(b).

I would note, initially, that the reported decisions from other jurisdictions considering the disqualification of individuals who were discharged for failing to pay union dues, even in the absence of any excuse whatsoever, like the referee, board of review, circuit court, and Court of Appeals in the present case, have consistently relied upon the disqualification for "voluntarily [leaving] without good cause."[7] No reported decision has found such actions to constitute "misconduct connected with the individual's work." Nevertheless, determining the application of either statutory disqualification *requires* considering the factual circumstances which resulted in the claimant's unemployment.

I find particularly troublesome the statement in Justice BRICKLEY's opinion that "[n]o matter what the merits" of Parks' dispute with her employer were, her failure to pay the agency fees, in the amount demanded, prior to a judicial determination of the constitutionally permissible amount of those fees after remand by the United

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[7] See Anno: 90 ALR2d 835. See also, e.g., *Nottelson v Wisconsin Dep't of Industry*, 94 Wis 2d 106; 287 NW2d 763 (1980), text accompanying n 12 and cases cited therein. Cf. *Barksdale v Dir of Div of Employment Security*, 397 Mass 49; 489 NE2d 994 (1986).

States Supreme Court in *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), constituted "work-connected misconduct." To suggest that the Legislature intended § 29(1)(b) to be so expansive as to disqualify an individual who is discharged from public employment in a case in which the employee properly asserted a "meritorious" claim that the First and Fourteenth Amendments protected the individual from submitting to the employer's demands is untenable.

The flaw in the analyses of my colleagues' opinions for affirmance stems from their failure to carefully consider the factual circumstances which led to Parks' discharge in order to evaluate whether her actions constituted "misconduct" or a "voluntar[y] [leaving] without good cause" within the statutory meaning of § 29(1)(a) or (b). I would emphasize that the application of either disqualifying provision *requires* a careful evaluation of the claimant's conduct within the factual circumstances presented, case by case. Considering the factual circumstances surrounding Parks' discharge, I would conclude that neither statutory disqualification is applicable. My disposition of this case, based upon a resolution of the statutory issues, would make it unnecessary to address the constitutional question presented.

A

An understanding of the issues presented in *Parks* requires a brief summary of the dispute which resulted in Parks' unemployment, including the United States Supreme Court decision in *Abood*, *supra*, and Parks' dismissal as a party plaintiff in that case on remand from the United States Supreme Court.

Pursuant to the agency shop agreement negotiated and incorporated into the collective bargaining agreement concluded in 1969 between the Detroit Federation of Teachers and the Detroit Board of Education, all teachers employed by the board were required either to join the union or to pay the union a service fee equal to dues required of union members as a continuing condition of employment.[8] Justice BRICKLEY treats the case at bar as if there could be no justifiable excuse for the nonpayment of the service fee in the amount requested, and that, regardless of an employee's claim that the amount requested exceeds that which is constitutionally permissible, the failure to forward such payments upon demand constitutes, "work-connected misconduct." My colleagues, like the trial court and the Court of Appeals, treat this case as if the agency shop agreement required, without exception, that the claimant pay the fees, that it gave the union an absolute and unlimited right to require payment of the fees and to demand discharge of a nonpaying employee, and that the board had no alternative but to discharge the claimant. I am persuaded that my colleagues' view of the rights and obligations of the claimant, the union, and the board is erroneous.

In *Abood*, *supra*, in which Parks was one of the plaintiffs, the United States Supreme Court unanimously reversed the decision of the Michigan Court of Appeals which had affirmed the dismissal of the action com-

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[8] In 1973, the Legislature amended the public employment relations act to permit agency shop union security agreements. See MCL 223.210; MSA 17.455(10). In *Abood v Detroit Bd of Ed*, 60 Mich App 92, 98; 230 NW2d 322(1975), the Court of Appeals held that the 1973 amendment could not be applied retroactively and, therefore, invalidated the agency shop provision in the contract entered into in 1969 between the Detroit Federation of Teachers and the Detroit Board of Education.

menced by Parks and other teachers challenging the constitutionality of the public sector agency shop and the extent to which nonunion members could be compelled to financially support noncollective bargaining union expenditures which they opposed.[9] The Court of Appeals had acknowledged that, because statutory authority permitted the union to expend dissenters' fees for purposes unrelated to collective bargaining, the agency shop arrangement "could violate" the plaintiffs' constitutional rights.[10] Nonetheless, the Court of Appeals had affirmed the trial court's dismissal of plaintiff's action for failure to state a claim upon which relief could be granted

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[9] *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977). Justices Brennan, White, Marshall, Rehnquist, and Stevens joined in Justice Stewart's opinion. Justices Rehnquist and Stevens also wrote separate concurring opinions, and Justice Powell wrote a concurring opinion in which Chief Justice Burger and Justice Blackmun joined.

[10] *Abood*, n 8 *supra*, 60 Mich App 99. The Court construed § 10 of the PERA, as amended, which permits employment to be conditioned upon the payment of a service fee equal in amount to dues required of union members, as not limited to the proportionate necessary costs of collective bargaining and the concomitant benefits received by nonunion employees. The Court further stated:

> The political activities of labor unions are well-recognized. It is reasonable to assume that at least a portion of every union's budget goes to activities that could be termed political, e.g., support of candidates sympathetic to the union cause and lobbying for the passage of bills in the Legislature. Since the amendment of MCL 423.210; MSA 17.455(10), does not limit the nonmember's contribution to his proportionate share of the costs of collective bargaining, it is clear that the amendment sanctions the use of nonunion members' fees for purposes other than collective bargaining.
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> * * *
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> Therefore, we conclude that the agency shop clause, as prospectively authorized by the amendment to MCL 223.210; MSA 17.455(10), could violate plaintiffs' First and Fourteenth Amendment rights. [*Id.*, 99-100.]

because the plaintiffs had not *specifically* objected to *particular* union expenditures and, therefore, no appropriate remedy was available.[11] It was this aspect of the Court's decision which was reversed in *Abood*.

The Supreme Court's decision in *Abood* has spawned a great deal of commentary.[12] While upholding the public sector agency shop against a broad First Amendment challenge, the Court held that a union's use of compelled service fees for purposes "not germane to its duties as collective bargaining representative" impermissibly abridges a dissenting nonunion employee's freedom to refrain from associating with ideas and beliefs which he opposes.[13]

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[11] *Id.*, 102.

[12] See, e.g., Sullivan, *Freedom of association and the public sector agency shop: Ball v Detroit*, and *Abood v Detroit Board of Education*, 85 Dick L R 21 (1980); Pulliam, *Union security clauses in public sector labor contracts and Abood v Detroit Board of Education: A dissent*, 31 Lab L J 539 (1980); *The Supreme Court, 1976 Term*, 91 Harv L R 70, 188-98 (1977); Note, *Constitutional limits on the use of contributions compelled under agency shop agreements*, 38 La L R 850 (1978); Comment, *Abood v Detroit Board of Education: Association as a First Amendment right—The protection of the nonmember employee in the context of public sector unionism*, 1977 Utah L R 487. See also *Developments in the law—Public employment*, 97 Harv L R 1611, 1728-1734 (1984); Schmedemann, *Of meetings and mailboxes: The First Amendment and exclusive representation in public sector labor relations*, 72 Va L R 91 (1986); Comment, *The use of public funds for legislative lobbying and electoral campaigning*, 37 Vand L R 433 (1984).

[13] The Court accepted the proposition that the agency shop itself impinges upon dissenting employees' First Amendment rights of free speech and association inasmuch as the employee is forced to support an association espousing demands and ideas with which he does not agree. The Court acknowledged that the activities of public unions directly "influence governmental policymaking" and "may be properly termed political." *Abood*, *supra*, 231. The Court upheld the public sector agency shop only to the extent that it was necessary to promote

Thus, the Supreme Court upheld the enforcement of the agency shop agreement in question only to the extent that amounts demanded from dissenting nonunion employees reflected their pro rata share of the costs of collective bargaining, contract administration, and grievance adjustment.[14]

The *Abood* Court reversed the decision of the Michigan Court of Appeals regarding the burden of proof imposed upon dissenting nonunion members in such cases, referring to its decision in *Railway Clerks v Allen*, 373 US 113; 83 S Ct 1158; 10 L Ed 2d 235 (1963):

> [I]n holding that as a prerequisite to any relief each appellant must indicate to the Union the specific expenditures to which he objects, the Court of Appeals ignored the clear holding of *Allen*. As in *Allen*, the employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the consider-

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labor peace and stability, by permitting an exclusive bargaining representative, and avoiding the "free-rider" problem that would arise if the employees were not required to support the union financially, but still benefited from the union's collective bargaining activities. *Id.*, 224.

The Court held unanimously that nonunion employees could not, consistent with the First and Fourteenth Amendments, be compelled to contribute to the support of ideological causes which were not work related and that the employees opposed. See *id.*, 232-237.

[14] *Id.*, 235.

> able burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative. [*Abood*, 241.]

Vacating the decision of the Court of Appeals as "unduly restrictive," *id.*, 240, the Court held that the union must bear the burden of proving the amount of permissible expenditures. *Id.*, 237, 239. Although the Court found the statutory authority permitting agency shop union security agreements to be overbroad as authoritatively construed by the Michigan Court of Appeals, it did not strike down the statute. See *id.*, 232-237. But see Tribe, Constitutional Law, 589. Because no factual record had been established, the Court remanded the case for further proceedings, including the creation of an appropriate remedy. *Id.*, 242.

Contrary to the implication in Justice BRICKLEY's opinion, and the representations of counsel,[15] the *Abood* Court did not hold that the plaintiffs could be compelled

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[15] Counsel for appellee, Detroit Public Schools, has inaccurately represented the Supreme Court's decision in *Abood*. Counsel continues to assert that in *Abood*, the Court held that Parks had no "First Amendment right not to pay an agency service fee." During the circuit court proceedings, counsel argued, although she was subsequently corrected partially by cocounsel, that the *Abood* decision specifically disapproved the escrow remedy, and approved the pure rebate procedure. Wayne Circuit Court, Brennan, J., July 28, 1982, on appeal from the MESC Board of Review, pp 36, 47-49. Counsel continues to argue that the constitutional issues underlying the dispute which resulted in Parks' discharge were entirely settled "adversely to [Parks] in Abood." The specific holding in *Abood* vacating the Court of Appeals affirmance of the dismissal of Parks' claim and effectively reinstating that claim to proceed consistent with the Court's decision that the constitution requires imposing the burden of proof upon the union in such cases, has been completely ignored.

to forward the entire amount of the service fees to the union and to await a refund in an amount to be determined by the union.[16] Nor did the Court hold that plaintiffs, nonunion employees, could be required to exhaust internal union remedies prior to receiving a judicial determination of the permissible extent of the fees.[17] Although the *Abood* Court's holding was limited because of the procedural posture of the case, the Court expressly held that the action commenced by the plaintiffs in *Abood* could not, consistent with the First and Fourteenth Amendments, be dismissed for failure to state a claim, and that the union and the board, not the plain-

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[16] Because of the procedural posture of the case—dismissal for failure to state a claim—the Court did not pass upon the merits of the case or the constitutional sufficiency of the possible remedies which it discussed. Mr. Justice Stevens, concurring, *Abood*, *supra*, 244, said:

> [T]he Court's opinion does not foreclose the argument that the union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

More recently, in *Ellis v Brotherhood of Railway Clerks*, 466 US 435, 443-444; 104 S Ct 1883; 80 L Ed 2d 428 (1984), the Court expressly rejected the "pure rebate approach" because "the union obtains an involuntary loan for purposes to which the employee objects," and alternatives, such as "interest-bearing escrow accounts" are "readily available alternatives." See Sullivan, n 12 *supra*, 39-41.

[17] See Sullivan, n 12 *supra*, 28-32. The *Abood* Court "merely suggested the desirability of an internal union remedy," and the possibility that the parties would "voluntarily" resolve their dispute. *Chicago Teachers Union v Hudson*, ____ US ____; 106 S Ct 1076, n 19; 89 L Ed 2d 247 (1986) (citing *Abood*, *supra*, 240, and n 41). In *Chicago Teachers Union*, the Court held that a "reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker" is constitutionally required, *id.*, 106 S Ct 1078, and, thus, that a dissenting nonunion employee "need not exhaust internal union hearing procedures . . . ." *Id.*, (White, J., concurring).

tiffs, were constitutionally required, in the event that the parties could not "voluntarily" resolve their dispute, to establish that the amount of the agency shop fees reflected the proportionate costs of permissible collective bargaining expenditures.

The following appears to have occurred upon remand from the United States Supreme Court. The union and the board demanded payment of all outstanding agency fees pursuant to an internal union procedure by which the union would determine what amounts, if any, were to be refunded. Parks did not object to paying her share of the union's costs of collective bargaining. She alleged, however, that the amounts demanded grossly exceeded her pro rata share of those permissible costs, filing an extensive affidavit to support that allegation,[18] and moved the trial court, unsuccessfully, to allow depositing the entire amount of the fees demanded into a neutral escrow account pending the judicial determination of the appropriate costs. The union and the board moved to have Parks dismissed as a party plaintiff on grounds of lack of standing. After denying Parks' renewed motion to establish an escrow account, the Court dismissed Parks from the action for lack of standing to challenge the

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[18] Parks filed an affidavit in which she specifically objected to the use of the service fees for all political and ideological purposes unrelated to the union's duties as exclusive bargaining representative. She referenced numerous issues of an official union publication to support her allegation that the demanded fees included impermissible amounts, that she had not been provided with an accounting of her proportionate share of the union's costs of collective bargaining, and that the "authorization for deduction of full agency-shop service fees" which the union demanded she sign, contained the following language: " 'I hereby waive all right and claim for . . . monies paid in accordance with this authorization.' "

constitutional permissibility of the amount of the fee.[19] Immediately thereafter Parks was discharged.[20]

Parks contended that, pursuant to *Abood*, because the demanded service fee included disputed amounts, she was entitled to deposit the fees into an escrow account pending proof by the union of her proportionate share of the costs of collective bargaining, contract administration and grievance adjustment. She argued that compelling the payment of amounts beyond her proportionate share of those costs would be violative of her First and Fourteenth Amendment rights of free speech and association because it would impermissibly impose a prior restraint upon the free exercise of those fundamental rights.

On the basis of my reading of *Abood*, I am persuaded that Parks' assertions were meritorious and, therefore, that a justifiable excuse for her actions was presented. My interpretation of *Abood* in this regard is consistent with the Court of Appeals decision in *Ball v Detroit*, 84 Mich App 383; 269 NW2d 607 (1978), and the decisions

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[19] See *Detroit Bd of Ed v Parks*, 98 Mich App 22, 46-48, n 24; 296 NW2d 815 (1980). The constitutionality of Parks' dismissal escaped judicial review. The Court of Appeals found that issue to be moot "because Mrs. Parks' case is before us now ." *Id.*, 48. Parks' motion for reconsideration in which she asked the Court to reconsider, or at least explain, its disposition of her "constitutional" challenge to her discharge as somehow having become "moot" was denied.

[20] Parks appealed her discharge to the State Tenure Commission, which ruled in her favor. Her statutory challenge was rejected on appeal to the circuit court, and the Court of Appeals affirmed, holding that the teacher tenure act, MCL 38.71 *et seq.*; MSA 15.1971 *et seq.*, was inapplicable. *Detroit Bd of Ed v Parks*, n 19 *supra*. This Court affirmed the decision of the Court of Appeals. 417 Mich 268; 335 NW2d 641 (1983). Her constitutional challenge was not addressed by this Court.

of courts in other jurisdictions.[21] Moreover, it is consistent with two recent decisions in which the Supreme Court has interpreted its own decision in *Abood*. See *Chicago Teachers Union v Hudson*, ____ US ____; 106 S Ct 1066; 89 L Ed 2d 232 (1986); *Ellis v Brotherhood of Railway Clerks*, 466 US 435; 104 S Ct 1883; 80 L Ed 2d 428 (1984).

In *Chicago Teachers Union*, *supra*, 106 S Ct 1073, the Court considered the procedural safeguards required by the First Amendment in light of its decision in *Abood*, *supra*, that nonunion employees have a "constitutional right to 'prevent the union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative'" (quoting *Abood*, *supra*, 234). The Court held that "the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.*, 106 S Ct 1078.

The Court held, consistent with its earlier decision in *Ellis*, *supra*, that a "forced exaction followed by a

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[21] *Ball* involved similar challenges to an agency shop agreement entered into in 1970 by the City of Detroit and the American Federation of State, County, and Municipal Employees. The Court of Appeals postponed its decision in *Ball* pending the Supreme Court's decision in *Abood*. See Sullivan, n 12 *supra*, for a discussion of *Ball* and *Abood*. Cf. *White Cloud Ed Ass'n v Bd of Ed*, 101 Mich App 309; 300 NW2d 551 (1980). See also *School Comm v Greenfield Ed Ass'n*, 385 Mass 70; 431 NE2d 180 (1982); *Beck v Communications Workers of America*, 468 F Supp 93 (D Md, 1983). See, generally, Anno: *Union security arrangements in state public employment*, 95 ALR3d 1102 (1979).

rebate" is inadequate because it does not "avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Id.*, 106 S Ct 1075. Quoting *Abood, supra*, 244 (concurring opinion), the Court said: " '[T]he union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.' " The Court emphasized its holding in *Abood* that, although the nonunion employee has the burden of raising an objection, "the union retains the burden of proof" concerning the constitutionally permissible amount of the required agency shop fees. *Chicago Teachers Union, id.* (citing *Abood, supra*, 239-240, n 40). The Court addressed the union's burden of proof in this regard, furthermore, stating that the union is required to establish the amount of expenditures for permissible "collective bargaining and contract administration," and not simply to identify the amount impermissibly expended. *Id.*, 106 S Ct 1076.

The Court addressed the union's proposal that maintaining an escrow of one hundred percent of the contributions exacted from dissenting nonunion employees would eliminate any valid constitutional objection to the procedure it had instituted.[22] The Court rejected that proposal, stating that the union's procedure would

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[22] The union had instituted the escrow procedure subsequent to the district court's decision. The Court considered the procedure as it was presented to the district court, stating: "It is clear that 'voluntary cessation of allegedly illegal conduct does not moot a case.' " *Chicago Teachers Union*, n 17 *supra*, 106 S Ct 1075, n 14 (citation omitted). The union also advised the Court that it "would not object to the entry of a judgment compelling it to maintain an escrow system in the future." *Id.*, 106 S Ct 1077.

remain flawed in two respects because it did not "provide an adequate explanation for the advance reduction of dues, and it [did] not provide a reasonably prompt decision by an impartial decisionmaker." *Id.*, 106 S Ct 1077. The Court said:

> We reiterate that these characteristics are required because the agency shop itself impinges on the nonunion employees' First Amendment interests, and because the nonunion employee has the burden of objection. The appropriately justified advance reduction and the prompt, impartial decisionmaker are necessary to minimize both the impingement and the burden. [*Id.*]

The Court concluded that, even with the proposed one hundred percent escrow, the union's internal rebate procedure would continue "to provide less than the Constitution requires in this context," and, therefore, affirmed the Court of Appeals judgment of reversal. *Id.*, 106 S Ct 1078.

The propriety of Parks' discharge is not at issue in the case at bar.[23] The meritoriousness of her claim, that the First and Fourteenth Amendments prohibited her employer from requiring her to submit the agency fees in the manner in which those fees were demanded, must be considered, however, in determining whether her actions constituted "misconduct connected with [her] work" or a "voluntar[y] [leaving] without good cause attributable to

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[23] Parks does not challenge the constitutionality of her discharge, but only her disqualification from receiving unemployment benefits. The merits of her dispute with the board are considered in this opinion only to the extent that, "[t]he circumstances under which one leaves work must be carefully examined" in determining the applicability of § 29(1)(a).

the employer" within the meaning of § 29(1)(a) or (b). The circuit court, affirming the split decision of the MESC Board of Review,[24] expressly declined considering the "merits" of Parks' asserted justification for her actions.[25] I am persuaded that the circuit court erred in not considering the particular circumstances which led to Parks' discharge, and that the Court of Appeals memorandum affirmance was likewise erroneous in that regard. In reviewing the application of § 29(1)(a) or (b), the particular circumstances surrounding the claimant's discharge must be carefully considered. Under the circumstances, I am convinced that Parks' actions, after remand from the United States Supreme Court in *Abood*, were based upon a meritorious First Amendment claim against her employer. I would hold, therefore, that her actions did not constitute "misconduct" within the meaning of § 29(1)(b), and that her refusal to pay the service fees, which included an amount properly disputed, did not constitute a "voluntar[y] [leaving] without good cause attributable to the employer."

The analyses of my colleagues, like that of the Court

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[24] The MESC Board of Review affirmed the referee's decision by a vote of two to one. The dissenting member correctly considered the holding of the United States Supreme Court in *Abood* concerning the limited permissibility of the public sector agency shop, consistent with the First and Fourteenth Amendments, and the union's burden of proof to constitutionally justify the amount of the agency fees compelled from dissenting nonunion employees as a condition of public employment.

[25] The circuit court noted that the constitutionality of the public sector agency shop was "exhaustive[ly]" addressed by the United States Supreme Court in *Abood*, *supra*. The circuit court also noted that the propriety of Parks' discharge had been examined in "another action." The circuit court, therefore, found it unnecessary, in reviewing the application of § 29(1)(a), to consider, to any extent, the merits of Parks' asserted justification for her conduct. See *id.*

of Appeals and circuit court, fails to adequately consider the particular circumstances which resulted in Parks' discharge. The assertion in Justice BRICKLEY's opinion that Parks "did not have a constitutional *right* not to pay the fees," is inaccurate, and does not support his analysis. The Supreme Court, in *Abood*, expressly held that Parks had presented a valid claim under the First and Fourteenth Amendments and that the burden of constitutionally justifying the amount of the agency shop fees rested with the union and the board. The *Abood* decision did not require Parks to pay the fees upon demand without any explanation whatsoever of the union's permissible expenditures, and to submit the entire amount of the disputed fees to the union in order to have standing to challenge the constitutionally permissible amount of the fees.

To characterize Parks' refusal to relinquish her First Amendment rights as wilful "misconduct connected with [her] work" is untenable; it was neither "misconduct" nor "connected" in any significant way with her work as a teacher and counselor.

With regard to Parks' disqualification under § 29(1)(a), the merits of her claim must be considered in determining whether she "left work voluntarily" and "without good cause attributable to the employer." Because Parks' asserted a meritorious justification for not paying the agency fees in the amount and terms demanded, her unemployment did not result "voluntarily without good cause attributable to the employer.[26]

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[26] See n 18.

Cf. *Nottelson v Wisconsin Dep't of Industry*, 94 Wis 2d 106; 287 NW2d 763 (1980). When an employee, in good faith, relies upon a meritorious legal justification for his noncompliance with a rule of employment, his actions are not necessarily inconsistent with the employer-

Pursuant to the Supreme Court's decision in *Abood*, Parks reasonably believed, acting upon the advice of counsel, that her constitutional right to be free from coerced political and ideological conformity entitled her not to contribute the agency fee under the circumstances in which it was demanded. She did not refuse "to pay any fee whatsoever;" she refused to pay an amount equal to union dues directly to the union without an escrow arrangement, subject to an internal rebate procedure, without any advance reduction, explanation or accounting, or an opportunity to challenge the amount of the fee before an impartial decisionmaker. I would conclude that the decision of the Court of Appeals affirming Parks' disqualification under § 29(1)(a) was clearly erroneous. The Court failed to consider the particular circumstances which led to Parks' discharge, including the asserted justification for her actions. Pursuant to my reading of *Abood*, *supra*, Parks' actions were in justifiable reliance upon her good-faith and meritorious belief that, consistent with the United States Constitution, she could not be compelled, under the particular circumstances, to submit to her employer's demand.

Finally, I would clarify that the constitutionality of Parks' discharge is not dispositive of the statutory issues presented in the case at bar. Whether Parks appealed her dismissal as a party-plaintiff in *Abood*, whether she chose to contest the propriety of her discharge before the Teacher Tenure Commission, and the outcome of any of

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employee relationship, and, therefore, his unemployment after being discharged, without regard to the propriety of the discharge, may not have been "voluntary" or "without good cause attributable to the employer" within the meaning of § 29(1)(a).

the potential litigation concerning Parks' discharge which did, or could have, ensued, is, likewise, not dispositive. In reviewing the application of § 29(1)(a) or (b), the particular factual circumstances surrounding the claimant's discharge are controlling. My colleagues' analyses are flawed to the extent that they avoid evaluating the asserted justification for Parks' actions.

III

In *Wickey v Employment Security Comm*, 369 Mich 487; 120 NW2d 181 (1963), this Court strictly construed the predecessor of § 29(1)(a), and reaffirmed its earlier rejection of the doctrine of "constructive voluntary leaving." *Id.*, 497. We granted leave to appeal in each of the present cases to consider the application of § 29(1)(a) in cases in which the claimant was discharged—in each case the claimant's disqualification was upheld by the Court of Appeals on the basis of that provision.

I would acknowledge that § 29(1)(a) may be applicable, under some circumstances, in cases in which an employee is discharged; the applicability of § 29(1)(a) should not be limited to cases in which the employee says "I quit." When an employee voluntarily fails to comply with a condition of employment with knowledge that such failure requires resignation or will result in termination, and without good cause attributable to the employer, that disqualifying provision may, under the particular circumstances, be applicable. Issues concerning "volition" and "good cause" must be determined case by case. Whether an employee was formally discharged as opposed to voluntarily resigning should not, in all cases, be dispositive. When a claimant asserts a justifiable

excuse for his actions, that justification must be carefully considered. See, e.g., *Nottelson v Wisconsin Dep't of Industry*, 94 Wis 2d 106; 287 NW2d 763 (1980); *Barksdale v Dir of Div of Employment Security*, 397 Mass 49; 489 NE2d 994 (1986). See, generally, Packard, *Unemployment without fault: Disqualifications for unemployment insurance benefits*, 17 Vill L R 635 (1972), and cases and commentary cited therein.

IV

In summary, I concur in Justice BRICKLEY's decision for reversal in *Dolce*. While I disagree with Justice BRICKLEY's construction and application of § 29(1)(b) in *Lindquist*, I concur in the decision to affirm on the basis of the Court of Appeals application of § 29(1)(a).

In *Parks*, I would conclude that neither subsection (1)(a) or (b) is applicable, under the particular facts presented, and would, therefore, reverse the decision of the Court of Appeals. My disposition of *Parks* would make it unnecessary to address the independent constitutional question presented.[27]

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[27] Parks challenges her disqualification under § 29(1)(a) as violative of the federal constitution on independent First Amendment grounds. Parks asserts that because "the agency shop itself is 'a significant impingement on First Amendment rights,'" *Chicago Teachers Union*, n 17 *supra*, 106 S Ct 1076-1077, n 20 (quoting *Ellis*, n 16 *supra*, 455), her disqualification, assuming she voluntarily terminated her own employment without good cause attributable to her employer within the meaning of § 29(1)(a), would be unconstitutional as applied and, therefore, that an exemption would be constitutionally required. See Anno: *Discharge from employment on ground of political views or conduct as affecting right to unemployment compensation*, 29 ALR4th 287; Anno: *Leaving or refusing employment for religious reasons as barring unemployment compensation*, 12 ALR4th 611 (1982). Parks argues that the important govern-

LEVIN J., concurred only in the result reached by RILEY, J.

BOYLE, J. (*concurring in part and dissenting in part*).

I concur in Justice RILEY's finding that Lindquist was disqualified from the receipt of unemployment benefits under § 29(1)(a)(1). I would find that Dr. Parks' refusal to pay union dues resulted in termination pursuant to the collective bargaining agreement. Because Mr. Dolce's retirement was for reasons beyond his control, I agree with Justice BRICKLEY's result.

I further agree with Justice RILEY that it is inappropriate in these cases to engage in a strained construction of the "work connected" requirement for disqualification on the basis of misconduct. Thus, I concur with Justice BRICKLEY's result in *Parks*, but not with his analysis in that case.

CAVANAGH, J. (*concurring in part and dissenting in part*).

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mental interest in labor stability, which justifies, to a limited extent, public sector union security agreements inasmuch as they narrowly serve that interest by preventing the "free rider" problem, does not justify the additional penalty resulting from the denial of unemployment benefits. She argues that no independent overriding governmental interest justifies compelling her to choose between her entitlement to unemployment compensation benefits and her First Amendment rights. Defendant-appellee Board of Education argues that "the only response which [this] Court needs to make to this argument is to rebuke Parks for asserting it," because "*Abood* had already decided the 'constitutional issue.' "

Because I would conclude that neither statutory disqualification is applicable in *Parks*, I would not reach this independent constitutional issue.

LINDQUIST

I concur with Justice RILEY's application of § 29(1)(a) of the Michigan Employment Security Act to plaintiff Lindquist's violation of the Saginaw City residency requirement.

PARKS

I concur with Justice BRICKLEY's decision in *Parks*; however, I would find that Parks, like Lindquist, was disqualified under § 29(1)(a) of the Michigan Employment Security Act. Parks' failure to pay agency fees constituted a voluntary leaving of her work.

It should be noted that the Supreme Court remand in *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), clearly encouraged Mrs. Parks to use the internal procedure established by the union for determining her pro rata share of the agency fees.[1]

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[1] In view of the newly adopted Union internal remedy, it may be appropriate under Michigan law, even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute.[45]

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[45] We express no view as to the constitutional sufficiency of the internal remedy described by the appellees. If the appellants initially resort to that remedy and ultimately conclude that it is constitutionally deficient in some respect, they would of course be entitled to judicial consideration of the adequacy of the remedy. [431 US 242.]

The voluntary procedure was described in *Abood, supra*, 240, n 41.

> Under the procedure adopted by the Union, as explained in the appellees' brief, a dissenting employee may protest at the beginning of each school year the expenditure of any part of his agency-shop fee for "'activities or causes of a political nature or

On remand to the circuit court, the trial judge ordered a stay in the proceedings to allow exhaustion of the internal union remedies.[2] Apparently Mrs. Parks refused to participate in the union procedure, and the circuit court dismissed her case on that basis. She did not appeal the circuit court's dismissal of her case for lack of standing. The appeal of her firing under the teacher tenure act to the Court of Appeals did not raise the constitutional issue discussed in *Chicago Teachers Union v Hudson*, ____US ____; 106 S Ct 1066; 89 L Ed 2d 232 (1986). Her motion for reconsideration was properly denied by the Court of Appeals as the constitutional issue had not been properly preserved.

DOLCE

Plaintiff Dolce was required to retire pursuant to a collective bargaining agreement between the employees and the employer. The retirement age was sixty-five years unless the employee wished to work an additional three years. Dolce chose to work until age sixty-eight.

The lead opinion for reversal finds that Dolce is entitled to unemployment benefits as he did not voluntarily leave his work. It would hold that the collective bargaining process is too remote from the individual to

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involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment.'" The employee is then entitled to a pro rata refund of his service charge in accordance with the calculation of the portion of total Union expenses for the specified purposes. The calculation is made in the first instance by the Union, but is subject to review by an impartial board.

[2] *Detroit Bd of Ed v Parks*, 98 Mich App 22, 46, n 24; 296 NW2d 815 (1980).

allow any legislative presumption that an employee is bound by the agreement. In effect, an employee is considered not to have consented to the collective bargaining agreement.

The case on which the lead opinion relies, *Campbell Soup Co v Employment Security Bd of Review*, 13 NJ 431; 100 A2d 287 (1953), was rejected by the Court of Appeals in *Applegate v Palladium Publishing Co*, 95 Mich App 299; 290 NW2d 128 (1980), lv den 409 Mich 904 (1980). In *Applegate*, the Court of Appeals agreed with the Minnesota Supreme Court that, by being a member of the union, an employee has ratified or joined in union decisions and is bound by the decisions. *Bergseth v Zinsmaster Baker Co*, 252 Minn 63; 89 NW2d 172 (1958).[3] Thus, an employee like Dolce has given his consent, either express or implied, to the terms of the collective bargaining agreement including the retirement provisions.

The lead opinion looks to section two of the Michigan Employment Security Act to establish that unemployment benefits are to be used "for the benefit of persons unemployed through no fault of their own." No one has alleged any fault or misconduct on Dolce's part. Section two also provides that unemployment benefits serve as protection against the "crushing force" of unemployment and "th[e] hazard[s] of our economic life." The act was also designed to encourage employers to establish "stable employment." MCL 421.2; MSA 17.502.

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[3] *MESC v Vulcan Forging Co*, 375 Mich 374; 134 NW2d 749 (1965), can be distinguished from the present case. It involved a forced, unpaid vacation for low seniority employees due to a plant shutdown.

The facts establish that Ford Motor Company provided Dolce with stable employment for over thirteen years. Dolce's retirement was not the result of a layoff or plant closing or any precipitous economic condition. A negotiated retirement is a contractual benefit to an employee designed to prevent unexpected economic loss. Indeed, the provision of the retirement plan in the present case allowing an employee three additional years of work seems most equitable.

Justice BRICKLEY upholds plaintiff Parks' disqualification from unemployment benefits on the basis that the union properly exercised its contract rights in requesting that the employer terminate Parks for her refusal to pay agency fees as the forced collection of these fees had been held constitutional in *Abood*, *supra*.[4] If this same rationale is applied to Dolce, it is clear that the collective bargaining contract may be properly invoked to mandate retirement as bona fide retirement plans are a recognized exception to the constitutional prohibition against age discrimination. Michigan Civil Rights Act.[5]

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[4] See discussion of *Parks*.

[5] MCL 37.2202; MSA 3.548(202):

(1) An employer shall not:

(a) Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

I would find Dolce disqualified for unemployment benefits under § 29(1)(a) of the Michigan Employment Security Act.

(c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including a benefit plan or system.

(2) This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or system which is not a subterfuge to evade the purposes of this section.

(3) This section shall not apply to the employment of an individual by his or her parent, spouse, or child.

Court of Appeals Opinion

STATE OF MICHIGAN
COURT OF APPEALS

ANNE B. PARKS,

Plaintiff-Appellant,

v

Docket # 66385
OCT 26 1983

MICHIGAN EMPLOYMENT SECURITY COMMISSION and DETROIT PUBLIC SCHOOLS,

Defendants-Appellees.

Before: J.H. Gillis, P.J., and R.S. Gribbs and H.R. Gage,* JJ.

MEMORANDUM OPINION

Plaintiff appeals as of right from a circuit court opinion and order affirming the decision of the Michigan Employment Security Commission Board of Review's decision disqualifying plaintiff from receipt of unemployment benefits under subsection 29(1)(a) of the Employment Security Act, MCL 421.29(1)(a); MSA 17.531(1)(a).

Our review of the record and briefs leads us to conclude that the decision made by the Board of Review and affirmed by the circuit court that claimant voluntarily left work without good cause attributable to her employer, MCL 421.29(1)(a); MSA 17.531(1)(a), is not contrary to law and is supported by competent, material,

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* Circuit Judge, sitting on the Court of Appeals by assignment.

and substantial evidence on the record. Const 1963, art 6, § 28, MCL 421.38; MSA 17.540.

Affirmed.

/s/ John H. Gillis
/s/ Roman S. Gribbs
/s/ Hilda R. Gage

Circuit Court Opinion

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

ANNE B. PARKS, Claimant-Appellant -vs- MICHIGAN EMPLOYMENT SECURITY COMMISSION AND DETROIT PUBLIC SCHOOLS, Appellees.	HONORABLE THOMAS J. BRENNAN (P-11173) CIVIL ACTION No. 82-201-178-AE

OPINION OF THE COURT

The appeal at bar results from a 2-1 affirmance of the Board of Review of the referee (R 117-118). The referee had held that claimant, Parks (the employee) was not entitled to receive unemployment compensation benefits pursuant to MCLA 421.29(1)(a) (R 96-99). The Commission had previously held that the claimant was not disqualified pursuant to MCLA 421.29(1)(b) (separation eventuating from work related misconduct) (R 68). That decision was upheld upon redetermination, notwithstanding reliance upon MCLA 421.29(1)(a) by the employer (R 73). Claimant now assigns the determination of the referee and the Board of Review to the effect that she is disqualified from receipt of benefits as error.

Judicial review of Employment Security Act cases is

set forth by the Act itself. MCLA 421.38 states:

> "421.38 Judicial review.
>
> Sec. 38. (1) The circuit court of the county in which the claimant resides or the circuit court of the county in which the claimant's place of employment is or was located, or if a claimant is not a party to the case, the circuit court of the county in which the employer's principal place of business in this state is located, *may review questions of fact and law on the record made before the referee and the board of review involved in a final order or decision of the board, and may make further orders in respect thereto as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.* Application for review shall be made within 20 days after mailing of a copy of the order or decision by any method permissible under the rules and practices of the circuit courts of this state.
>
> (2) An order or decision of a hearing referee may be appealed directly to the circuit court if all parties agree to do so by written stipulation filed with the referee.
>
> (3) The commission shall be considered to be a party to any judicial action involving an order or decision of the board of review or a referee.
>
> (4) An appeal may be had from the decision of the circuit court in the same manner as provided by the laws of this state with respect to appeals from circuit courts.
>
> Amended by P.A. 1975, No. 110, § 1, Eff. June 8; P.A. 1977, No. 52, § 1, Imd. Eff. July 5," (Emphasis added).

Circuit Court Opinion

Thus in considering the determination of the Board, the function of the Court is to determine whether the decision of the Board is supported by competent, material and substantial evidence on the whole record, *King* v *Calument & Hecla Corp*, 43 Mich App 319 (1972); *Villela* v *MESC*, 16 Mich App 187 (1969). Where, as here, there is no substantial dispute as to the relevant facts the question is one of law, *Apperly* v *General Motors Corp*, 20 Mich App 374 (1969); *Cooper* v *U of M*, 100 Mich App 99 (1980).

Mindful of the foregoing the record as set forth below will then be examined.

MCLA 421.29 (the subject statute) relevantly states as follows:

> "421.29 Disqualifications for benefits
> Grounds
>
> Sec. 29. (1) Except as provided in section 69, an individual shall be disqualified for benefits in the following cases in which the individual:
>
> (a) * * * Left work voluntarily without good cause attributable to the employer or employing unit."

The inquiry then becomes whether the referee and the Board of Review correctly applied the aforesaid statute in determining that claimant appellant was disqualified thereunder.

Subsequent to the hearing of November 15, 1978, the referee made the following findings of fact:

> "Claimant worked for the Detroit Board of Education from 1935 until March 10, 1978. She last

worked as a guidance counsellor at Cody High School. In 1969, the employer recognized the Detroit Federation of Teachers and an agency shop was instituted in the Detroit School system. Claimant has "actively opposed compulsory payments to the DFT, believing that . . . freedoms of speech, association, and political autonomy are abridged by these coerced payments." Further, she objects to "being forced to support financially an organization which conducts activities to which I am opposed, such as the DFT's illegal strike in September, 1973." Finally, she objects "to the use of compulsory agency-shop service fees for all purposes other than the DFT's cost of collective bargaining, contract administration, and grievance adjustment on behalf of the bargaining unit in which I am employed. I specifically object to the use of service fees for all political and ideological purposes unrelated to the DFT's duties as exclusive bargaining representative." (Exhibit 15, page 2) Effective March 11, 1978, claimant was terminated from the involved employer pursuant to a certified letter dated March 3, 1978 providing that:

"Pursuant to the requirements of the Contract with the DFT, the Board of Education at its regular meeting of January 10, 1978, approved the termination of your employment, effective March 11, 1978. The Board provided, however, that its action to terminate you will be automatically rescinded if you submit evidence to the undersigned before March 11, 1978, that you are in compliance with the requirements of Article I, C of the Board of Education/DFT Bargaining Agreement.

"You are being officially advised that your termi-

> nation of employment will be effective March 11, 1978, because of your failure to be in compliance with the requirements of Article I, C of the Board of Education DFT Collective Bargaining Agreement." (Exhibit 8 page 4) R96-97)

The factual findings of the referee are supported by clear, competent and substantial evidence on the whole record, MCLA 421.38;[1] the question then becomes whether the legal conclusion induced therefrom by the referee, to wit, that the claimant left work voluntarily without good cause attributable to the employer. MCLA 421.29 (1)(a) is similarly supportable.

Prior to deciding the above issue, this Court will take judicial pause to note *in limine* what this appeal does not concern, albeit of collateral relevance hereto. First, the question of the constitutionality of the agency shop agreements, predicate for the compensation being sought, was the subject of exhaustive address by the United States Supreme Court, *Abood* v *Detroit Board of Education*, 431 US 209; 97 S Ct 1782, 52 L Ed 2d 261 (1977); reh den 433 US 915, 97 S Ct 2989, 53 L Ed 2d 1102 (1977). That constitutional soil will not be revisited herein. Second, neither, will this Court consider the propriety of the claimant's discharge. The question was the subject of independent examination in another

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[1] Plenary review of the record as made reflects that claimant was terminated on March 11, 1978 (R12) having failed to pay the subject agency shop fees; that said action was pursuant to a governing contract and that the claimant was admonished as to her obligation to pay said fees (R 21, 24). It is further clear that claimant did not quit in a colloquial sense (R 44). Additional testimony, exhibits and documentation do no violence to the factual findings of the referee (R, *passim*).

action.[2]

The decisional question herein then becomes whether a claimant who is discharged for failing to pay agency shop fees has left work voluntarily without good cause attributable to the employer or employing unit within the intendment of MCLA 421.29 (1)(a).[3]

Albeit in a sense "voluntary leaving" and "discharge" are differentiable terms, *stare decisis* reflects that a claimant may be disqualified from receipt of unemployment compensation benefits notwithstanding the fact that the claimant was discharged, see for example *Jenkins* v *Appeal Bd of Michigan Employment Sec Commission*, 364 Mich 379 (1961);[4] the fact that the actions of the employee resulting in either permanent or temporary cessation of the employment relationship may not have been intentional does not militate against a finding of voluntariness for purposes of the Employment Security Act, *Phillips* v *Employ Sec Comm*, 373 Mich 210 (1964). In *Echols* v *Emp Sec Comm*, 380 Mich 87 (1968) a taxicab driver was held to be disqualified as having left work voluntarily without good cause attributable to the employer. There the claimant had been unable to continue his

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[2] *Det Board of Ed* v *Parks*, 98 Mich App 22 (1980), lv grtd 411 Mich 970; said case affirmed the discharge of claimant-appellant; see also *White Cloud Ed Assn* v *Bd of Ed*, 101 Mich App 309 (1980) regarding dismissal for failure to pay agency shop fees.

[3] Albeit the original determination of the Commission found its focus in MCLA 421.29(1)(b) (discharge for misconduct). The record reflects that the employer eschewed reliance upon said statutory section (R 7) and the referee thus held said section inapplicable (R 99).

[4] Denial of benefits therein was affirmed by an equally divided Court.

employment by virtue of the suspension of his motor vehicle operator's license. The majority opined as follows:

> "Kelly, J. Quoting from the decision of the appeal board:
>
> "The appeal board has ruled on several occasions that the loss of a claimant's prerequisites for continued employment, especially through his own negligence, is a voluntary leaving without good cause attributable to the employer. * * *
>
> In the instant matter, the claimant lost his operator's license through no fault of the employer and it is our opinion that his leaving was not constructive but purely a voluntary leaving and he should be disqualified. * * *
>
> It is held that the claimant voluntarily left his work on September 1, 1963, without good cause attributable to the employer and he is therefore disqualified for the duration of his unemployment under the provisions of section 29(1)(a)(1) of the act."
>
> * * *
>
> "I agree with the decisions of the appeal board, the circuit court, and the Court of Appeals." *Echols*, *supra*, 92, 93, 94. (Emphasis added).

In the case before us, the finding of voluntariness is clearly even more compelling inasmuch as the claimant's loss of prerequisites for continued employment (i.e. the payment of the at issue agency shop fees) was not the result of a *negligent* act of omission, but rather the pro-

duct of a *voluntary choice* with knowledge of the consequences.

In the same light *Applegate* v *Palladium Pub Co*, 95 Mich App 299 (1980) (lv den) merits consideration. In *Applegate* the claimant, pursuant to a compulsory retirement provision by which he was governed, did, in fact, retire. Notwithstanding the absence of a free choice, to wit, whether to retire or not, the claimant was held disqualified as having voluntarily left work without good cause attributable to the employer.

> "We find unacceptable and unworkable the 'subjective' approach of the Campbell court. See 50 ALR 3d at 883. Instead, we adopt the analysis of the Bergseth case and affirm the circuit court's ruling that plaintiff is disqualified for unemployment benefits due to his 'voluntary' termination of employment. Action taken by employees under a contract negotiated for them by their authorized agent must be considered their voluntary acts. In effect, plaintiff agreed to terminate his employment voluntarily pursuant to the collective bargaining agreement. As observed by the Ohio court in Marcum v Ohio Match Co, 4 Ohio App 2d 95, 98; 212 NE 2d 425, 427 (1965), plaintiff, 'through his agent,' entered into this contract. He chose to accept its benefits including the pension. He must also abide by the duties called for by such agreement." *Applegate*, *supra*, 305

In the case at bar to admit of appellant's claim would be to allow one who acted in derogation of the obligations

of the employment relationship to benefit thereby.[5] To thus hold would elevate form over substance in derogation of the stated purpose of the Act itself.

> ". . . *Involuntary unemployment* is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state. . . ." MCLA 421.2

The record in the case at bar clearly reflects that claimant appellant became unemployed (i.e. was discharged) by virtue of her knowing act of will.

In the light of the foregoing, additional assignments of error being unsubstantial and/or unsupported by the record, the decision of the referee and the Board of Review disqualifying claimant-appellant from receipt of benefits pursuant to MCLA 421.29(1)(a) being infected with no clear error of law and being supported by clear competent and substantial evidence on the whole record, is therefore affirmed.

An Order in conformance with this Opinion shall be presented for entry.

THOMAS J. BRENNAN

Thomas J. Brennan (P-11173)
Circuit Judge

[5] The fact that claimant in *Applegate* was a union member does not render that holding inapposite for same is a distinction without a difference.

Circuit Court Opinion

Dated: Detroit, Michigan
July 28, 1982

Copies sent to:
David E. Kempner, Esq.
Mary Ellen Gurewitz, Esq.
Bruce N. Cameron, Esq.
Gunther Schwarze, Esq.

[Clerk's certification omitted.]

Circuit Court Order

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

ANNE B. PARKS,

Claimant-Appellant,

vs.

MICHIGAN EMPLOYMENT SECURITY COMMISSION AND DETROIT PUBLIC SCHOOLS,

Appellees.

No. 82 201178 AE
Hon.
Thomas J.
Brennan

ORDER

At a session of said court, held in the City-County Building, City of Detroit, State of Michigan on **AUG 5 1982**

PRESENT: HONORABLE **THOMAS J. BRENNAN**
Circuit Court Judge

IT IS HEREBY ORDERED that the decision of the Michigan Employment Security Commission Board of Review, which held that the plaintiff was disqualified from receipt of unemployment compensation benefits, is affirmed for the reasons set forth in the Court's opinion of July 28, 1982.

THOMAS J. BRENNAN
Circuit Court Judge

Approved as to form:

/s/ Theodore Sachs

Theodore Sachs (P 19827)
1000 Farmer Street
Detroit, Michigan 48226

Gunther Schwarze
(P 20147)
7310 Woodward Avenue
Room 606
Detroit, Michigan 48202

David E. Kempner (P 23329)
2900 City National Bank
Building
Detroit, Michigan 48226

[Clerk's certification omitted.]

MESC Board of Review Decision

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

ANNE B. PARKS,
Claimant

DETROIT PUBLIC SCHOOLS,
Employer

Appeal Docket No.
B78-12258-66005

Social Security No.
383-38-0972

DECISION OF BOARD OF REVIEW

This ia an appeal from the referee's decision in this case, a copy of which is attached hereto and by this reference made a part hereof. We have reviewed the referee's decision in the light of the evidence appearing in the record. It is the opinion of the majority of the Board of Review panel assigned to review this case, that said decision is in conformity with the law and facts.

The decision of the referee is hereby affirmed.

/s/ Frank Salomone

Frank Salomone, Member

/s/ Beverly A. Hall

Beverly A. Hall, Chairperson

MORRIS W. B. COHL (MEMBER), DISSENTING:

I disagree with the Board majority and would hold the

MESC Board of Review Decision

claimant not disqualified for benefits for the following reasons.

Initially I would point out that, in my opinion, the claimant did not voluntarily leave her work. Rather, her employment of some 43 years was terminated by the employer due to her refusal to pay agency service fees to the Detroit Federation of Teachers. Therefore, this matter should have been decided under the misconduct discharge provisions of Section 29(1)(b) of the Act. Under that Section of the Act "'good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.'" *Carter* v *Employment Security Commission*, 364 Mich 538, 541 (1961).

The claimant based her refusal to pay agency service fees upon the U.S. Supreme Court decision is *Abood* v *Detroit Board of Education*, 431 U.S. 209 (1977). In that case, the Court stated that, if agency service fees are required, the union has the burden of providing, upon request, information as to the exact amount that is spent on collective bargaining, contract administration and grievance adjustment. The claimant requested but was not provided with such information by the union.

In my opinion, the claimant's refusal to pay agency service fees was, at the most, a good-faith error in judgment or discretion and the resulting discharge is not disqualifying under the MES Act.

/s/

Morris W. B. Cohl, Member

MESC Board of Review Decision

MAILED AT DETROIT, MICHIGAN January 6, 1982

This decision will become final unless a written request for rehearing or appeal to the appropriate circuit court is RECEIVED on or before

January 26, 1982

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.

[Notice of means of appeal omitted.]

MESC Notice of Redetermination

DEPARTMENT OF LABOR
MICHIGAN EMPLOYMENT SECURITY COMMISSION
13501 Schaefer, Detroit, MI. 48227

NOTICE OF DETERMINATION OR REDETERMINATION

EMPLOYING UNIT

City of Detroit
Detroit Public Schools
5057 Woodward Ave.
Detroit, MI.

CLAIMANT

PARKS, Anne B.
18313 Biltmore
Detroit, MI.

FILING DATE

S.S. NO. 383 38 0972

RE DETERMINATION ISSUED: 3/13/79

ISSUE(S) AND SECTION(S) OF MICHIGAN EMPLOYMENT SECURITY ACT INVOLVED:

Administrative Error

FINDINGS OF FACT, REASONS, AND ☐ DETERMINATION ☒ REDETERMINATION

This redetermination is being issued to cancel the restitution imposed by a previous determination which was established in error based on Referee Decision B78 12258.

Said appeal was timely protested but the branch office was not notified.

[Notice of qualification/requalification requirements and means of appeal omitted.]

DATE PERSONALLY SERVED	OR	DATE MAILED
		MAR 5 1979

EB/gw /s/

MESC Findings of Facts,
December 26, 1978

Department of Labor
MICHIGAN EMPLOYMENT SECURITY COMMISSION

REFEREE DIVISION

IN THE MATTER OF THE CLAIM OF	**EMPLOYER INVOLVED**
. Anne B. Parks	. Detroit Public Schools
. 18313 Biltmore	. 5057 Woodward Avenue
. Detroit, MI 48235	. Detroit, MI 48202
S.S. NO. 383 38 0972	**APPEAL NO.** B78 12258

REFEREE: LOIS H. SMITH

FINDINGS OF FACTS AND REASONS

This matter is before the Referee on the appeal of the employer dated August 30, 1978 from a redetermination issued by the Michigan Employment Security Commission on August 15, 1978 which held claimant not disqualified for unemployment benefits under Subsection 29 (1) (b) of the Michigan Employment Security Act. The basis for the redetermination was stated by the Commission as follows:

> "The employer has requested a timely redetermination stating claimant deliberately and voluntarily quit her job. Claimant refused to render required dues to the union thus resulting in her separation. Based on all available information it is deemed claimant's separation is for reasons other than mis-

MESC Findings of Facts,
December 26, 1978

conduct in connection with the work as defined under Section 29 (1) (b) of the Act.

"The determination issued on 5/3/78 is hereby affirmed."

(Exhibit 9)

The hearing was scheduled in Detroit, Michigan on November 15, 1978 at which the following persons appeared:

Anne B. Parks, Claimant
David E. Kempner, Attorney for Claimant
Rose Marie Schmidt, Assistant Director of Personnel for Employer
Kenneth McAlpine, Junior Administrative Assistant, Personnel Department, Witness for Employer

Claimant worked for the Detroit Board of Education from 1935 until March 10, 1978. She last worked as a guidance counsellor at Cody High School. In 1969, the employer recognized the Detroit Federation of Teachers and an agency shop was instituted in the Detroit School system. Claimant has "actively opposed compulsory payments to the DFT, believing that . . . freedoms of speech, association, and political autonomy are abridged by these coerced payments." Further, she objects to "being forced to support financially an organization which conducts activities to which I am opposed, such as the DFT's illegal strike in September, 1973." Finally, she objects "to the use of compulsory agency-shop service fees for all purposes other than the DFT's cost of collective bargaining, contract administration, and grievance

MESC Findings of Facts,
December 26, 1978

adjustment on behalf of the bargaining unit in which I am employed. I specifically object to the use of service fees for all political and ideological purposes unrelated to the DFT's duties as exclusive bargaining representative." (Exhibit 15, page 2) Effective March 11, 1978, claimant was terminated from the involved employer pursuant to a certified letter dated March 3, 1978 providing that:

> "Pursuant to the requirements of the Contract with the DFT, the Board of Education at its regular meeting of January 10, 1978, approved the termination of your employment, effective March 11, 1978. The Board provided, however, that its action to terminate you will be automatically rescinded if you submit evidence to the undersigned before March 11, 1978, that you are in compliance with the requirements of Artical I, C of the Board of Education/DFT Bargaining Agreement.
>
> "You are being officially advised that your termination of employment will be effective March 11, 1978, because of your failure to be in compliance with the requirements of Article I C of the Board of Education DFT Collective Bargaining Agreement."

(Exhibit 8 page 4)

Two issues are presented herein: whether the claimant left her work voluntarily without good cause attributable to the employer within the purview of Subsection 29 (1) (a) of the Michigan Employment Security Act, or, as the Commission contended, that she was discharged. The pertinent provisions of the Act are as follows:

MESC Findings of Facts,
December 26, 1978

"Sec. 29 (1) An individual shall be disqualified for benefits in all cases in which he:

"(a) Has left work voluntarily without good cause attributable to the employer or employing unit.

"(b) Has been discharged for misconduct connected with his work, whether or not the discharge has subsequently been reduced to a disciplinary layoff or suspension, or for intoxication while at work."

Where a worker is employed in an establishment which has a collective bargaining agreement which provides that all employees must pay union membership dues or agency shop service fees and a worker is separated from his employment because he/she has failed to pay such dues or service fees, his/her separation should be considered a leaving of work. Of course, the worker should be advised of this requirement at the time of hire. However, if a worker refuses to join a company union or pay agency shop service fees when an agency shop was instituted after such worker accepted employment, then unemployment benefits should not be denied.

In the opinion of the Referee, the facts in the present appeal do not establish that the claimant's loss of employment was other than "voluntarily without good cause attributable to the employer." (See Appeal Board decisions: B55-4076-18070, July 3, 1956; B8-5378-9263; B6-31830-5676; B8-678-8351; and B69-1093-37335).

The Referee rejects claimant's argument that she was not advised of union fees at the time of hire. The contract of hire did not tie the employer and employee together con-

MESC Findings of Facts,
December 26, 1978

cerning all conditions of employment. On the contrary, each academic year, claimant made an agreement which had its own specifics with regard to the terms of employment covering the involved period. For the academic year of 1978, a term of the employment contract which claimant worked under until March, 1978 required claimant to pay an agency shop service fee. She refused to make such payment and was discharged. The Referee believes claimant's separation from her employment was a result of an action instituted by herself and is therefore a voluntary leaving without good cause attributable to the employer. The redetermination issued by the Commission on August 15, 1978 should be modified accordingly.

DECISION

The redetermination issued by the Michigan Employment Security Commission on August 15, 1978 is hereby modified.

The disqualification provisions of Subsection 29 (1) (b) of the MES Act are held inapplicable. However, claimant is held disqualified for unemployment benefits under subsection 29 (1) (a) of the Act, such disqualification to begin in the week in which the leaving occurred pursuant to Subsection 29 (2) of the Act and to continue until claimant has completed the requalification requirements imposed by Subsection 29 (3) of the Act with appropriate reduction in claimant's benefit entitlement pursuant to Subsection 29 (4) of the Act.

MESC Findings of Facts,
December 26, 1978

Any benefits paid during the period of disqualification involved in this appeal are to be repaid by the claimant in an amount to be determined by the Commission under Subsection 62 (a) of the Act. The Commission shall further determine whether the chargeable employer's rating account is entitled to credit under Subsection 20 (a) of the Act.

Further holdings with regard to this claimant's eligibility and qualification for unemployment benefits are left for future Commission determination.

/s/ Lois H. Smith

Lois H. Smith REFEREE

Dec 26 1978

Mailed at

DETROIT, MICHIGAN

[Notice of means of appeal omitted.]

Parks Affidavit

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

D. LOUIS ABOOD, et al.,
Plaintiffs,
v
DETROIT BOARD OF EDUCATION, DETROIT FEDERATION OF TEACHERS, et al.,
Defendants.

Civil Action
No. 155255

CHRISTINE WARCZAK, et al.,
Plaintiffs,
v
DETROIT BOARD OF EDUCATION, et al.,
Defendants.

Civil Action
No. 145080

AFFIDAVIT

COUNTY OF WAYNE)
STATE OF MICHIGAN) SS:

ANNE B. PARKS, being duly sworn, deposes and says:

1. I am one of the Plaintiffs in *Warczak* v *Detroit Board of Education*, No 145080, and make this Affidavit in support of Plaintiffs' Motion for Order Permitting

Escrow of "Service-Fee" Deductions. All facts set forth herein are within my personal knowledge, and if called as a witness I can testify competently thereto.

2. I am a duly licensed and certified teacher in the State of Michigan and have been employed by the Detroit Board of Education since 1935. I am now on the Board's continuing contract, or tenure, system and am currently employed by the Board as a guidance counsellor at Cody High School. I reside at 18313 Biltmore, Detroit, Michigan 48235.

3. I am not, and have not been at anytime, a member of the Detroit Federation of Teachers (DFT). Since the inception of the agency shop in the Detroit school system in 1969, I have actively opposed compulsory payments to the DFT, believing that my freedoms of speech, association, and political autonomy are abridged by these coerced payments. Furthermore, I object to being forced to support financially an organization which conducts activities to which I am opposed, such as the DFT's illegal strike in September, 1973.

4. In addition to my general objection to being compelled to subsidize an unwanted bargaining representative, I object to the use of compulsory agency-shop service fees for all purposes other than the DFT's costs of collective bargaining, contract administration, and grievance adjustment on behalf of the bargaining unit in which I am employed. I specifically object to the use of service fees for all political and ideological purposes unrelated to the DFT's duties as exclusive bargaining representative.

Parks Affidavit

5. Attached hereto as Exhibits A through M are true copies of the following pages of various issues of *The Detroit Teacher*, official publication of the DFT, which have been distributed to teachers and counselors in Cody High School:

A. February 25, 1974, page 2;

B. May 13, 1974, pages 2 and 3;

C. September, 1974, page 5;

D. April 14, 1975, pages 6 and 7;

E. May 12, 1975, pages 1, 6, 7, 8, 10, and 11;

F. June 12, 1975, pages 5 and 7;

G. October 7, 1975, page 1;

H. October 21, 1975, pages 1 and 6;

I. November 4, 1975, pages 1 and 3;

J. January 26, 1976, page 7;

K. May 11, 1976, pages 1, 4, and 5;

L. September 28, 1976, pages 1, 4, and 5; and

M. October 27, 1976, pages 1, 3, 5, 7, and 8.

6. The foregoing attached excerpts from *The Detroit Teacher* (*e.g.*, May 12, 1975, p 7) show that 50% of the DFT's budget is paid out in "per capita dues" to other labor organizations with which the DFT is affiliated, specifically the Michigan Federation of Teachers, the American Federation of Teachers, the Metropolitan Detroit AFL-CIO, and the Michigan AFL-CIO. They further show that the DFT and its affiliates engage in political and ideological activities which are not part of the process of collective bargaining, contract administra-

tion, and grievance adjustment.

7. In June, 1977, shortly after the decision of the United States Supreme Court in these cases, I received several communications from the DFT demanding that I remit a check to the DFT for the full amount of the agency-shop service fee for the 1976-1977 school year and sign an authorization for deduction of full agency-shop service fees beginning September, 1977. Attached hereto as Exhibits N through P are true copies of said communications from the DFT. The DFT did not inform me that I have a constitutional right to "prevent the Union's spending a part of [my] required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Abood* v *Detroit Board of Education*, 97 S Ct 1782, 1799; 52 L Ed 2d 261, 283 (1977). Nor did the DFT provide me with an accounting of my proportionate share of its costs of collective bargaining, contract administration, and grievance adjustment. Moreover, the authorization for deduction of agency-shop service fees which the DFT demanded that I sign, copies of which are attached hereto as parts of Exhibits N and P, contained the following language: "I hereby waive all right and claim for *** monies paid in accordance with this authorization." Therefore, acting upon the advice of my attorneys, I have refused and will continue to refuse to pay the agency-shop service fee until such time as an escrow arrangement is established for service-fee deductions which will protect my right to be free from coerced political and ideological conformity.

Parks Affidavit

/s/ Anne B. Parks

Anne B. Parks

Subscribed and sworn to before me, this Sep 06 1977 day of September, 1977.

GEORGE L. RICHARDS
Notary Public, Wayne County, Mich.
Acting in Wayne County, Mich.
My Commission Expires July 10, 1978

/s/ George Richards

Notary Public

Transcript, MESC Referee Division, November 15, 1978

STATE OF MICHIGAN

BEFORE THE MICHIGAN EMPLOYMENT SECURITY COMMISSION

REFEREE DIVISION

In the Matter of the Claim of

ANNE B. PARKS,
Claimant

Appeal No. B78-12258

DETROIT PUBLIC SCHOOLS,
Employer

Testimony taken and proceedings had in the above-entitled matter before Referee Lois H. Smith, at 7310 Woodward Avenue, Room 316, Detroit, Michigan 48202, on Wednesday, November 15, 1978, commencing at 1:00 P.M.

APPEARANCES:

Anne B. Parks, Claimant

David E. Kempner, Attorney for Claimant

Rose Marie Schmidt, Assistant Director of Personnel, Detroit Public Schools

Kenneth McAlpine, Junior Administrative Assistant, Detroit Public Schools

Transcript, MESC Referee Division,
November 15, 1978

[Examination of Kenneth McAlpine by Referee]

* * * *

Q Okay. Now, you told the Referee that the claimant was terminated effective March 11, 1978.

A Yes.

Q Do the records indicate who terminated her?

A Well, the action is initialed by—the initials which appear here are Mr. Fred Martin's who is the head of the personnel department.

Q Okay. Tell the Referee why.

A Why was Miss Parks terminated? Dr. Parks was terminated after several clear advisements to pay the legally due agency shop fees.

* * * *

Q Any other notice?

A Well, she received a letter from Mr. Jerome Brooks who at that time was our General Counsel in Labor Relations and that was dated December 29.

Q You are referring to Exhibit 8, page 2?

A Yes.

Q And what was the content of that document?

A Well, this informs Miss Parks that the union had been in contact with the Board reminding them of the Article I, Section C which is—makes it incumbent on the Board to dismiss any employee who is—if the Board has received a signed statement from the union indicating that the employee has failed to comply with this condition shall

immediately notify said employer that his or her services shall be discontinued at the end of sixty days and shall dismiss said employee accordingly.

Q All right. When you talk about—

MR. KEMPNER: If I may just make one comment. Earlier, you were talking about what other sections of the contact. I believe you already have in your file - and you already have a complete contract - but on page 4 of the contract just one thing that should be pointed out—

REFEREE: Mr. Kempner?

MR. KEMPNER: Yes.

REFEREE: Okay. Go ahead.

MR. KEMPNER: Section 5 of—or Article I, Section C, Sub. 5 does state that if any provision in this Article is invalid under federal or state law said provision shall be modified (inaudible) requirements of said federal or state law, and I would assume that that language would be broad enough to include a decision by the Supreme Court relative to the constitutionality of part of that.

Just a point of clarification. This agency shop clause is not just Article C. Article I all the way through Article C which goes down through Section 8 on page 4.

REFEREE: Okay.

Transcript, MESC Referee Division,
November 15, 1978

Q (By Referee) Employer, any other basis for terminating this claimant?

A No. We feel that the contract speaks for itself regardless of what cases may yet be determined. We have to go by what is in existence at this time, and Miss Parks having been employed at least since 1937 with the Detroit Board. I'm sure she was employed when the elections were held to determine who would represent the employees. She has been with us as long as there has been a written contract. She has been with us while it was held that the Federation could negotiate and did represent the teachers, and she should have apprised herself of the knowledge which is contained in the agreement. It has been stated in that since the 1969-71 contract that this should be - this shall be a condition of employment, and it is continued through this contract.

Q To this contract, referring to the one—

A To the one that she was employed—the last one that—

* * * *

[Examination of Anne B. Parks by David E. Kempner]

Q Dr. Parks, to clarify one matter, when were you first employed by the Detroit Board of Education?

A I was first employed by the Board early in 1935 as a substitute teacher.

Transcript, MESC Referee Division, November 15, 1978

Q Okay. Could you clear up the discrepancy that we have about Courville School in 1937?

A Well, it's perhaps a matter of the way the records were kept. I was a substitute in 1935 and for the first semester in 1936, and the fall of 1937 I was placed at the Davidson School, and in the spring of 19—or the fall of 1936, I was placed at the Davidson School and in the spring of 1937, I was placed at the Courville School. I'm not sure about the date, whether May is correct or not. I thought it was earlier in the semester, but I'm sure the Board figure would be correct.

Q And you have been continuously employed—you were continuously employed from that time through March of 1978 by the Detroit Board of Education.

A Yes, I was a Board employee all that time. I was on leave twice.

Q When was that?

A The first time was about 1942 or 3 for a year or so there, and then in the spring of 1962.

Q When you were hired, was agency shop requirement in effect?

A No.

Q It's true in fact that the first agency shop provision covering teachers didn't go into effect until 1970.

A That's correct to the best of my knowledge.

Transcript, MESC Referee Division,
November 15, 1978

Q So, in other words, you were employed by the Detroit Board of Education for approximately 35 years before the first contract went into effect which required the payment of either union dues or an equivalent agency shop service fee as a condition of employment.

A That would be correct.

Q Now, prior to the effect date of the first agency shop provision, were you a party of any lawsuit in litigation regarding agency shop?

A Yes, I was a participant in the Abood case which I believe was before the date you mentioned.

Q I see. Point of clarification. I believe the Abood case was consolidated—

A I'm sorry it was that case, it was that case. I'm not a lawyer either.

Q The Abood case and the Warsak (phonetically) were consolidated in 1973, I believe, by the Michigan Court of Appeals and they both went up together to the U.S. Supreme Court, but Miss Parks, as she has corrected herself, was a—one of the original plaintiffs in the Warsak (phonetically) case and that was filed when?

A Oh, I think that was 1969.

Q And what was—who were the parties in that case besides yourself?

A Oh, there were a considerable number of Detroit teachers and counselors.

Transcript, MESC Referee Division,
November 15, 1978

Q And who were the defendants?

A The Detroit Federation of Teachers and I would think the Detroit Board of Education also.

Q And that suit basically involved what? What was the issue in that case?

A Well, the issue in that case was whether an employee could be forced to pay agency shop fees to be used by the Federation for causes, some of which were political or ideological, which the employee did not believe in and would not have his or her own accord support mentioned.

Q So, in effect, this was a constitutional challenge taken up under the First Amendment, is that right?

A I would judge it that way.

Q Now, in that case, it was eventually consolidated with Abood and considered by the United States Supreme Court and eventually ruled upor by the U.S. Supreme Court on June of 1977. Is that correct?

A That's correct.

Q Now, between 1969 when the lawsuit started or I guess I should say 1970 when the first agency shop clause went into effect and 1977 when the Supreme Court issued its decision, did you pay any agency shop fees to the Federation?

A Just one year.

Transcript, MESC Referee Division,
November 15, 1978

Q Okay. When was that?

A Oh, I think that was about 1973.

Q Okay. And how did you pay that?

A I paid under protest by check.

Q Now, after the Supreme Court issued its decision ah—well, first of all prior to the ah—did you know, prior to the Supreme Courts decision, was there any agreement in effect between the Federation and the union as to agency shop? Any agreement as to what would happen to anybody who didn't pay?

A You mean before 1977?

Q I'm specifically thinking was there any agreement not to discharge certain people under the agency shop clause?

A Well, in the original contract, the Board of Education and the union had agreed to a clause that no litigant would be fired as long as the case was in litigation.

Q The case is still in litigation, right?

A The case is still in litigation, and I have the greatest respect for the Board of Education for adhering to that up to the time of the Supreme Court decision. I regret very much that it has not continued to adhere to that commitment.

Q Now, after the Supreme Court's decision in June of 1977, the case was remanded back to Wayne County Circuit Court, is that correct?

Transcript, MESC Referee Division, November 15, 1978

A That's correct.

Q And the litigation is continuing?

A That's correct.

Q All right. Following this Supreme Court decision and the time of the remand, did the Federation make any demands of you regarding agency shop?

A Yes. It asked for the fee.

Q Okay, and what fees are you talking about?

A Well, there are union membership dues and there are the agency shop fees which you pay if you do not become a member of the Federation.

Q And you're not a member of the Federation?

A No, I am not.

Q So, they were asking for agency shop fees for what years?

A Well, for the current year plus the previous years that were not paid.

Q Did you comply with these demands.

A No, I did not after much consideration.

Q Why not?

A Well, I felt that no one has the right to take your money and use it for purposes which you constitutionally object to and which the constitution recognizes. I guess you would have to say it's a matter of principle. It's something I strongly believe. I've been a history teacher, taught in

social studies, I've always believed in the Constitution and the rights of American citizens and that just happens to be my strong conviction.

Q So, you objected to payments that related to what?

A Well, specifically to money that was used for political purposes and for ideas and causes which the union went into which I opposed, one of which, of course, would be teacher strikes.

Q What causes would you not object to or what purposes would you not object to, or don't you object to?

A Well, I'm sure there are valid expenses that any organization has in running its office and serving the people who are members of it and so those would be valid reasons to pay.

Q So, what you're talking about there is collective bargaining, contract administration and grievance adjustment, those sorts of things.

A Yes, as far as collective bargaining, the only thing they could collect for from a non-member would be the expenses that pertain only to collective bargaining.

Q Collective bargaining in the Detroit school system?

A In the Detroit School system, specifically.

Q To your knowledge, has the Federation ever established that your agency fee—the amount of

Transcript, MESC Referee Division,
November 15, 1978

your agency fee is limited to the cost of collective bargaining, contract administration and grievance adjustments?

A To the best of my knowledge that has never been established. I have looked carefully at the publications. Never has it been made public to the best of my knowledge.

Q Do you have any reason to believe that part of the Federation's agency shop fee is spent for purposes other than collective bargaining, contract administration—

A Yes, I do.

Q Have you ever submitted any formal papers in court documenting your—documenting this?

A Yes, they have been submitted.

* * * *

Q And just to make the record clear, you did not leave your job voluntarily?

A I did not leave my job voluntarily. I was engaged in a different type of counseling work at that time which with all my heart I wanted to continue at least through June, and I would have done it, as I say, without any pay. I did not leave voluntarily.

Q So, after 43 years you were told to get out and not show your face at Cody High School?

A Unfortunately, I was told I could not be in the school or on the school grounds. I don't know

whether that means—meant other Board of Education facilities or not, but definitely I was told that someone had been authorized to tell me that I was not to be in the school or on the school grounds.

Q Now, if you prevail in your tenure case, do you plan to go back to school?

A Yes.

Q Now, if there is a judicial determination sometime in the future as to how much the Detroit Federation of Teachers can lawfully require agency fee payers to pay, would you be willing to pay this amount to the Federation?

A If that is a legal decision according to the Supreme Court.

Q So, you would be willing to pay the amount if there is a judicial determination of how much they can lawfully collect?

A I am willing to follow the law.

Q Now, prior to such a judicial determination, would you be willing to pay the full amount of the agency shop fee into an escrow account?

A I have so previously indicated.

Q And you believe based on the number of pieces of information that has come to you—come to your attention some of which are included in that affidavit, you believe the current agency shop fee requires teachers to pay more than the money

they can lawfully be required to pay?

A Yes, I do.

Q And the Detroit Federation has never proved the amount of the fee falls within the guidelines set forth by the Supreme Court?

A To the best of my knowledge, no.

Q Now, reference was made to the agency shop fee that was in effect—or agency shop clause that was in effect at the time of your firing. Under this clause did you know—is it true that the amount of agency shop fees required to be paid is an amount equal to the membership dues in the Federation?

A I believe it is the same amount.

Q And you believe this is more than the Federation is entitled to collect under the Supreme Court decision on Abood.

A I do so believe.

Q And is the basis why you refuse to pay the agency shop fee.

A That's right. I believe I am legally within my rights in so doing.

* * * *

MESC Redetermination

Department of Labor

MICHIGAN EMPLOYMENT SECURITY COMMISSION

20211 Greenfield, Detroit, MI.48235

NOTICE OF DETERMINATION OR REDETERMINATION

EMPLOYING UNIT	CLAIMANT
Detroit Board of Education 5057 Woodward Detroit, MI.	PARKS, Anne B. 18313 Biltmore Detroit, MI.

FILING DATE: **S.S. NO.** 383 38 0972

☐ DETERMINATION: ☒ REDETERMINATION of determination dated 5/3/78

☐ CLAIMANT IS ELIGIBLE FOR BENEFITS BEGINNING _____

☒ CLAIMANT IS NOT DISQUALIFIED FOR BENEFITS

☐ CLAIMANT IS INELIGIBLE FOR BENEFITS FROM _____ THROUGH _____
- ☐ and will continue to be ineligible as long as there is no change in the facts. If the facts change, claimant should contact the branch office nearest claimant's home and file a claim for benefits.

☐ CLAIMANT IS DISQUALIFIED for week ending _____ and until completion of a
- ☐ 6 week REQUALIFICATION period ☐ 12 week REQUALIFICATION period
- ☐ 13 week REQUALIFICATION period
  - ☐ which has not been satisfied ☐ which has been satisfied

(See reverse side for information regarding requalification)

☐ BENEFIT ENTITLEMENT WITH THIS EMPLOYER IS:
- ☐ reduced in the current benefit year by ____ weeks
- ☐ and/or reduced in the succeeding benefit year by ____ weeks

☐ NO BENEFIT YEAR IS ESTABLISHED BY CLAIM FILED ON _____

ISSUE(S) AND SECTION(S) OF THE MES ACT INVOLVED	BASIS FOR (RE)DETERMINATION
☐ Ability To Work - 28(1)(c) ☐ Availability For Work - 28(1)(c) ☐ Filing Of New Or Additional Claim - 28(1)(b), 32(a)(Regulation 210) ☐ Leaving To Accept New Work Or Recall - 29(5) ☒ Misconduct - 29(1)(b) ☐ Failure To Apply For Or Accept Suitable Work - 29(1)(c), (d), or (e) ☐ Reporting On Appointment - 28(1)(a) (Regulation 210) ☐ Seeking Work - 28(1)(a) ☐ Voluntary Leaving - 29(1)(a) ☐	The employer has requested a timely redetermination stating claimant deliberately and voluntarily quit her job. Claimant refused to render required dues to the union thus resulting in her separation. Based on all available information it is deemed claimant's separation is for reasons other than misconduct in connection with the work as defined under Section 29(1)(b) of the Act. The determination issued on 5/3/78 is hereby affirmed.

RIGHT OF PROTEST OR APPEAL: Any protest or appeal from this determination or redetermination must be filed in person or by mail and must be received within twenty (20) days after date mailed or personally served, or if such 20th day is a Saturday, Sunday or legal holiday, by the next day which is neither a Saturday, Sunday, nor legal holiday. (See reverse side for instructions)

DATE PERSONALLY SERVED	OR	DATE MAILED	JM/gw /s/
		AUG 15 1978	CLAIMS EXAMINER

MESC Determination

1. Claim Filed on		2. Branch Office No.	3. Benefit Year
3 21 78	IS ☐- DETERMINED ALLOWED SEE ITEM 15 ☒- DETERMINED AS SHOWN IN ITEM 14	22	3 19 78 THRU 3 17 79

4. Employer — Emp. No.	Code	5. Claimant
809 111 Detroit Board of Education 5057 Woodward Detroit, Mi 48202	F65	383 38 0972 Parks, Anne B 18313 Biltmore Detroit, Mi 48235

6. Total Employers & Credit Weeks	7. Average Weekly Wage	8. Dep'cy Class and Dependency Code	9. Weekly Benefit Rate	10. Credit Weeks Allowed This Det.	11. Full Week Payts. Allowed This Det.	12. Full Week Payts. This & Prior Dets.
1-35	$ 635.25	0000	$ 97	35	26	26

14.

Claimant was released for refusal to pay shop fees.

It is determined that claimant's discharge was for reasons other than misconduct in connection with the work within the meaning of the Michigan Employment Security Act.

Therefore, the claimant is not disqualified under Section 29(1)(b) of the Act.

[Notice of requalification requirements and means of appeal omitted.]

DATE MAILED OR PERSONALLY SERVED
5-2-78

NOTICE OF DETERMINATION OR REDETERMINATION

Form MESC 1575D (Rev.9-75) (Claimant Copy) Department of Labor MICHIGAN EMPLOYMENT SECURITY COMMISSION

Collective Bargaining Agreement

* * * *

I. RECOGNITION; DEFINITIONS; UNION MEMBERSHIP DUES OR AGENCY SHOP SERVICE FEES; OTHER ORGANIZATIONS; STRIKE PROHIBITION.

* * * *

C. Union Membership Dues or Agency Shop Service Fees

1. All employees employed in the bargaining unit, or who become employees in the bargaining unit, who are not already members of the Union, shall, within sixty (60) days of the effective date of this Agreement (as to present employees), or within sixty (60) days of their date of hire (as to future employees), become members, or in the alternative, shall as a continuing condition of employment, pay to the Union each month a service fee in an amount equal to the regular monthly Union membership dues uniformly required of employees of the board who are members of the Union.

2. The Board upon receiving a signed statement from the Union indicating that the employee has failed to comply with this condition shall immediately notify said employee that his/her services shall be discontinued at the end of sixty (60) days, and shall dismiss said employee accordingly.

Collective Bargaining Agreement

3. An employee who shall tender or authorize the deduction of membership dues (or service fees) uniformly required as a condition of acquiring or obtaining membership in the Union, shall be deemed to meet the conditions of this Article so long as the employee is not more than sixty (60) days in arrears of payment of such dues (or fees).

4. The Board shall be notified, in writing, by the Union of any employee who is sixty (60) days in arrears in payment of membership dues (or fees).

5. If any provision of the Article is invalid under Federal or State law, said provision shall be modified to comply with the requirements of said Federal or State law.

6. The Union agrees that in the event of litigation against the Board, its agents or employees arising out of this provision, the Union will co-defend and indemnify and hold harmless the Board, its agents or employees for any monetary award arising out of such litigation.

7. The Board shall deduct from the pay of each employee from whom it receives an authorization to do so the required amount for the payment of Union dues or Agency Shop service fees. Check-off authorization for Union dues or Agency Shop service fees which were executed prior to the execution of this Agreement shall remain of full force

Collective Bargaining Agreement

and effect. Checked-off dues or fees, accompanied by a list of employees from whom they have been deducted and the amount deducted from each, and by a list of employees who had authorized such deductions and from whom no deduction was made and the reason therefore, shall be forwarded to the Union office no later than thirty (30) days after such deductions were made. Employees who have not authorized check-off of Union dues or Agency Shop service fees may pay such dues or fees semi-annually, in advance, directly to the Union, not later than thirty (30) days after the employee's first work day each semester.

8. The Board shall inform all present employees within thirty (30) days of the opening of the school year, and future employees and employees returning from leave within thirty (30) days of hire or return, of their obligations under this section; provided that the failure of the Board to so inform shall not be a defense to any employee who has failed to comply with the provisions of this section. The Board shall continue to notify the Union of all new hires, and returns from absence or leave, and separations.

* * * *

Supreme Court, U.S.
FILED
APR 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1547

In The

Supreme Court of the United States

October Term, 1986

ANNE B. PARKS,

Petitioner,

v.

MICHIGAN EMPLOYMENT SECURITY COMMISSION and DETROIT PUBLIC SCHOOLS,

Respondents.

BRIEF OF DETROIT PUBLIC SCHOOLS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHERE PETITIONER'S DISCHARGE WAS ADJUDICATED IN A PREVIOUS CASE BETWEEN THE PARTIES TO BE PROPER, AND WHERE PETITIONER CONCEDED BELOW SUCH PROPRIETY, IS SHE PRECLUDED BY *RES JUDICATA* FROM ASSERTING HER PRESENT CLAIM?

II.

MAY AN EMPLOYEE WHO IS PROPERLY DISCHARGED FOR HER CONSTITUTIONALLY UNPROTECTED FAILURE TO PAY AGENCY SERVICE FEES NEVERTHELESS CLAIM A CONSTITUTIONAL ENTITLEMENT FROM HER EMPLOYER TO UNEMPLOYMENT COMPENSATION FOR THE SAME FAILURE?

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No. 86-1547

In The

Supreme Court of the United States

October Term, 1986

ANNE B. PARKS,

Petitioner,

v.

MICHIGAN EMPLOYMENT SECURITY COMMISSION and DETROIT PUBLIC SCHOOLS,

Respondents.

BRIEF OF DETROIT PUBLIC SCHOOLS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Petitioner Parks was a plaintiff in *Abood* v *Detroit Board of Education*, 431 US 209 (1977), wherein she, along with certain other Detroit school teachers, challenged the right of their employer, the Detroit Board of Education, to enter into an agency shop agreement requiring them to pay agency service fees to the union which represented them. In *Abood*, this Court held that it was constitutionally permissible for the school board to require employees to pay their share of the union's costs of collective bargaining, contract administration and grievance adjustment. 431 US 225-226. The Court remanded the case, stating that it would be appropriate under Michigan law to defer further proceedings until the parties

utilized the union's internal procedure for determination of what portion of the union's dues the plaintiffs could be compelled to pay. 431 US 242. The Court noted that the constitutional sufficiency of the internal procedure would be subject to further judicial scrutiny. 431 US 242 n. 45.

Upon remand, the *Abood* plaintiffs (including Parks) moved to escrow their fees pending the resolution of the internal union procedure. The motion was denied and no appeal was taken. *Detroit Board of Education* v *Parks*, 417 Mich 268, 272 n. 1. While other *Abood* plaintiffs paid the fees or invoked the internal review procedure, Parks did neither. She declined to pay any fees to the collective bargaining agent.[1] She was then dismissed from the *Abood* suit for lack of standing (and did not appeal that dismissal). In March, 1978, she was discharged from her employment. *Id* at 272 n. 1.

Parks challenged the legality of her discharge, contending only that it was contrary to the Michigan Teachers Tenure Act. In *Detroit Board of Education* v *Parks*, 417 Mich 268 (1983), the Michigan Supreme Court held that her discharge was lawful.

Parks also challenged the decision of the Michigan Employment Security Commission (MESC) to deny her unemployment compensation benefits, and it is that litigation which Parks seeks to bring before this Court by her petition for certiorari. The MESC held that Parks

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[1] The repeated assertions in the Petition as to why such payment was not made are entirely after-the-fact, self-serving statements rather than contemporaneous expressions. Furthermore, the petitioner's assertion (p. 8) that, "On remand, the trial court ordered her to pay a fee equal to dues to the union and then exhaust the union's rebate procedure," is not only unsupported by the record but is untrue. Petitioner was not ordered by the circuit court to do anything. She was dismissed by the Court as a party plaintiff, on motion, when she did not pay the fees and she was discharged by the respondent as an employee for such non-payment.

was disqualified from receiving unemployment compensation benefits because her discharge was tantamount to a voluntary leaving of employment. (App. pp. 67a, 71a-75a)

In *Parks II*, the present case, the Michigan Supreme Court made the following finding:

> [D]uring oral argument in the instant case, plaintiff's counsel explicitly noted that Dr. Parks was not trying to relitigate *Abood* or challenge her discharge. He further admitted that the agency fee is constitutional and that plaintiff's argument was not meant to suggest that the discharge was unlawful. Parks' argument, instead, was directed solely at the [statutory] issue addressed in this opinion.
>
> Since plaintiff did not before this Court pursue the constitutional status of her discharge after her dismissal from *Abood* and is not contesting it now, we, for purposes of the disposition of this case, assume no constitutional infirmity in her discharge. (App. pp. 6a-7a n. 1)

The majority of the Michigan Supreme Court thereupon addressed itself to the statutory issues presented by the case and concluded on state grounds that Parks was correctly disqualified from receipt of benefits.

Parks now seeks certiorari, claiming that the Michigan Supreme Court, which twice considered the circumstances of her discharge, was in error, and claiming that even though it was not unconstitutional to discharge her it was nevertheless unconstitutional to deprive her of unemployment compensation benefits for the selfsame conduct.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S CONSTITUTIONAL CLAIM IS PRECLUDED BY A PRIOR JUDGMENT AND BY ADMISSIONS BELOW.

Petitioner's claim that she was unconstitutionally denied unemployment compensation benefits because of the exercise of her First Amendment rights is not only without merit (see part II below), but is precluded by a prior judgment and by her admissions below.

In *Detroit Board of Education* v *Parks*, 417 Mich 268 (1983) (hereinafter *Parks I*), it was held that plaintiff was justifiably discharged for her non-payment of agency shop fees. That was the very issue in that case. Subsequent to the remand from this Court in *Abood* v *Detroit Board of Education*, 431 US 209 (1977), the Wayne Circuit Court, in *Abood*, denied plaintiffs' motion for an escrowed fee arrangement (some six years prior to this Court's decision in *Chicago Teachers Union* v *Hudson*, 475 US __, 106 S Ct 1066, 89 L Ed2d 232 (1986)). As subsequently summarized by the Michigan Court of Appeals in *Parks I*, 98 Mich App 22, 46 n. 24 (1980), adopted as footnote 1 by the Supreme Court in its opinion in *Parks I* at 417 Mich 268, 270 (1983), "no appeal [from the denial of that motion] was taken. In February of 1978, the circuit court granted defendants' motion to dismiss Anne Parks and Genevieve Repeta as plaintiffs for failure to pay agency shop fees. In March, 1978, Parks was discharged from her employment by the Board for failure to pay the fees, and she appealed her discharge to the State Tenure Commission."

Contrary to the claim in her present Petition, Parks did not "offer" to pay the disputed fees, much less did she tender them. The affidavit relied upon by Parks in

her present Petition in support of the statement that "she offered to pay into escrow the entire fee demanded; but she was not willing to pay any money directly to the union until it proved her proportionate share of its costs of collective bargaining, contract administration and grievance adjustment" (Petition, p. 5), is in fact an affidavit, dated September 6, 1977, among many similarly then filed in support of the *Abood* plaintiffs' collective motion for payment of their agency fees into escrow. It was *not* an "offer" made by Parks independently or subsequently to forestall her discharge. (App. pp. 77a-81a) Furthermore, she never tendered the agency fee, either conditionally or unconditionally; and her present explanation as to why she refused payment is simply a post-hoc rationalization framed in the words of a case decided six years later, *Chicago Teachers Union* v *Hudson, supra*, rather than a contemporaneous expression.

Not only did petitioner not offer or tender the agency fees, nor give any contemporaneous explanation as to why she was not paying the fees, nor appeal the denial of escrow, nor appeal her dismissal as a party plaintiff, nor appeal on any constitutional ground her discharge by the school board, she pursued only a state Tenure Act remedy, which was decided adversely to her in *Parks I*. The decision in *Parks I* is *res judicata* against any attempt subsequently — as here — to raise either constitutional or other issues as to the validity of her discharge.

Moreover, in the present case the Michigan Supreme Court made the findings which appear in footnote 1 (App. pp. 6a-7a), that petitioner's counsel conceded "that Dr. Parks was not trying to relitigate *Abood* or challenge her discharge. He further admitted that the agency fee is constitutional and that plaintiff's argument was not meant to suggest that the discharge was unlawful . . . . [¶] Since Plaintiff did not before this Court pursue the

constitutional status of her discharge after her dismissal from *Abood* and is not contesting it now, we, for purposes of the disposition of this case, assume no constitutional infirmity in her discharge."[2]

In short, in making an argument here that she was denied unemployment compensation for the exercise of her First Amendment rights, petitioner is in effect improperly seeking to relitigate the preclusive adjudication in *Parks I* and her contrary admissions in this case. Such an argument represents an improper collateral attack on matters previously decided or foreclosed and may not be appropriately presented to this Court.

II.

EVEN COULD THE MATTER BE CONSIDERED, PETITIONER'S CLAIM IS WITHOUT MERIT.

Even if the matter were properly before this Court, petitioner cannot present a meritorious claim for the alleged violation of her First Amendment rights.

As noted above, the Michigan courts found that after the denial of the *Abood* plaintiffs' escrow motion, which order was unappealed, petitioner Parks simply declined to pay her fees and for that reason was successively dismissed as a party plaintiff in *Abood* and as an employee by respondent Board.

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[2] Parks, in her brief to this Court, again conceded the lawfulness of her discharge, stating at page 11, "In *Abood, supra*, the Court found that the state had an important interest in requiring an employee to reimburse his union for its costs of collective bargaining on his behalf. 431 US at 221-226. Thus, the state could allow a public employer to make the payment of such a fee a condition of employment. In this case the collective bargaining agreement made the payment of a service fee a condition of employment. *Discharge was Dr. Parks' penalty for refusing to pay the agency fee.*" (Emphasis added)

Although the Michigan Supreme Court found and held in *Parks I* that her discharge was proper, and although she concededly has not heretofore contested its constitutionality, petitioner would now assert that she is unconstitutionally being punished for the exercise of her First Amendment rights. Although she denies it, petitioner really argues that although her employer had justification to discharge her for her *unprotected* exercise of First Amendment rights, it nevertheless became obligated to pay her unemployment compensation for that unprotected exercise.[3]

But it is a contradiction for petitioner to concede on the one hand, as she must, that she was properly discharged for her "exercise of First Amendment rights" and yet contend that she must receive unemployment compensation because of her exercise of the selfsame rights.

The claim of petitioner that *Abood* recognized her First Amendment rights is disingenuous. This Court said in *Abood* that, "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. . . . But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of th important contribution of the union shop to the system of labor relations established by Congress." 431 US 222. In short, this Court held that fee dissenters' First Amendment rights are not absolute but are subject to countervailing interests, and a failure to make the required payment exposes the free rider to discharge. 431 US 209, 212, 236.

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[3] Under Michigan law, the school board, like other public employers, in fact completely reimburses the unemployment compensation fund for all benefits paid to its employees by the State. MCL 421.13i(1)(a).

In the present case, petitioner concedes that, "In *Abood, supra,* the Court found that the state had an important interest in requiring an employee to reimburse his union for its costs of collective bargaining on his behalf. 431 U.S. at 221-26. Thus, the state could allow a public employer to make the payment of such a fee a condition of employment. In this case the collective bargaining agreement made the payment of a service fee a condition of employment. *Discharge was Dr. Parks' penalty for refusing to pay the agency fee."* (Emphasis added) Petitioner's brief, p. 11.

Parks' argument, that while discharge for non-payment is permitted unemployment compensation is nevertheless required, ignores the obvious burden that requiring the payment of unemployment compensation would impose upon an employer and the consequent reluctance which an employer would have to enter into or enforce a union security agreement, which agreement *Abood* recognizes serves an important state interest.

It is irrational to say on the one hand that petitioner's First Amendment rights do not protect her against discharge by her employer but to say on the other hand that her employer is required to pay her compensation for not working. It is as if public employees who are subject to discharge for engaging in constitutionally *un*protected speech, cf. *Connick* v *Myers,* 461 US 138 (1983), can nevertheless claim a constitutional right to unemployment compensation from the same employer for the same speech.

Petitioner's reliance upon *Hobbie* v *Unemployment Appeals Commission of Florida,* 480 US __, 108 S Ct __, 94 L Ed2d 190 (1987); *Sherbert* v *Verner,* 374 US 398 (1963); and *Thomas* v *Review Board of Indiana,* 450 US 707 (1981), is totally misplaced. In each of these cases the employee's unemployment resulted from the exercise of

First Amendment rights. The issue in each was whether, given that fact, the employee was constitutionally entitled to unemployment compensation. By contrast, Parks' unemployment resulted arguably at most from the exercise of speech held to be *un*protected by the First Amendment and, in fact, resulted from the mere non-payment of mandatory service fees. *Parks I, supra.* Therefore, there is no constitutional issue raised regarding her entitlement to unemployment compensation and those cases have no relevance whatsoever.

If the Detroit Board of Education had to discharge the petitioner, as it did, and as she concedes it did, because of her refusal to pay any part of her agency service fee, then surely it cannot be said that the Detroit Board has an obligation to bear the cost of her unemployment compensation payments. To sustain petitioner's argument would be to hold that unprotected speech which justifies a governmental employee's discharge nevertheless entitles her to compensation from the same employer for subsequently not working. To state the proposition is to answer it.

There is no meritorious constitutional issue presented.

CONCLUSION

WHEREFORE, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ANNE B. PARKS,

Petitioner,

v.

MICHIGAN EMPLOYMENT SECURITY COMMISSION
and DETROIT PUBLIC SCHOOLS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 22.5 of the Rules of this Court, the petitioner files this short Reply Brief in Support of her Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan.

In its effort to persuade this court to deny the petition, the respondent Detroit Public Schools (Employer) (1) argues that petitioner's claim in this unemployment compensation case is precluded by a prior judgment and

statements of petitioner's counsel regarding the validity of her discharge; and (2) incorrectly states the holdings of this Court in certain other unemployment compensation cases. Neither statements of counsel nor prior litigation foreclose Dr. Parks' claim that she was unconstitutionally denied unemployment compensation by the State of Michigan.

This case questions whether an employee may be twice penalized for the exercise of First Amendment rights. Dr. Parks offered to pay the contested union fees into an escrow account, but refused to pay them to the union until a neutral decisionmaker determined the appropriate amount of her agency fee. She was discharged for this refusal and that discharge was the first penalty imposed upon her. All the litigation over the propriety of that discharge, any failure to raise certain claims, any admissions of counsel regarding her discharge all deal with the first penalty imposed on Dr. Parks.

This case involves the imposition of a second penalty: denial of unemployment compensation. While prior litigation and statements of counsel regarding Dr. Parks' discharge provide necessary background, they in no way foreclose this Court's decision on the propriety of imposing a second penalty upon Dr. Parks for her refusal to pay union fees that were not proven to represent only her fair share of the union's bargaining costs.

This case, just like *Hobbie v. Unemployment Appeals Commission of Florida*, _____ U.S. _____, 108 S. Ct. _____, 94 L.Ed.2d 190 (1987), *Thomas v. Review Bd. of Indiana*, 450 U.S. 707 (1981) and *Sherbert v. Verner*, 374 U.S. 398 (1963), raises the question of whether a state may deny unemployment compensation to an employee

who is out of work because of the exercise of First Amendment rights. There can be no dispute that Dr. Parks' discharge came about because of the exercise of her First Amendment right to stand apart from a union, and her refusal to support financially its political activities. *Chicago Teachers Union, Local 1 v. Hudson*, _____ U.S. _____, 106 S. Ct. 1066, 1073-74 (1986). What she subsequently did or did not do to overturn that discharge is not relevant to this case. What is important is whether, given the reason for her discharge, the State of Michigan may now impose a second penalty upon her by denying unemployment compensation benefits.

In cases like *Hobbie*, *Sherbert* and *Thomas*, the argument can be made that the employees had no constitutional claim against their private sector employers to work which did not violate their religious beliefs. *See*, *Otten v. Baltimore & Ohio Railway Co.*, 205 F.2d 58 (2d Cir. 1953). Whatever the merits, if any, of their constitutional claims on the work issue, this Court independently examined their constitutional claims to unemployment compensation. So also in this case the Court should independently examine petitioner's unemployment compensation claim.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant her petition.

Respectfully submitted,

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